

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF TEXAS
3 WACO DIVISION

3 DENSYS, LTD) Docket No. WA 19-CA-680 ADA
4 vs.)
5 3SHAPE TRIOS A/S,) Waco, Texas
6 3SHAPE A/S)
7) August 31, 2020

7 TRANSCRIPT OF VIDEOCONFERENCE MARKMAN HEARING
8 BEFORE THE HONORABLE ALAN D. ALBRIGHT

9 APPEARANCES:

10 For the Plaintiff: Mr. Ronald M. Daignault
11 Mr. Oded Burger
12 Goldberg Segalla, LLP
13 711 Third Avenue, Suite 1900
14 New York, New York 10017

14 For the Defendant: Mr. William D. Belanger
15 Mr. Frank Liu
16 Troutman, Pepper, Hamilton,
17 Sanders, LLP
18 125 High Street,
19 High Street Tower, 19th Floor
20 Boston, Massachusetts 02110

19 Mr. Goutam Patnaik
20 Troutman, Pepper, Hamilton,
21 Sanders, LLP
22 2000 K Street NW, Suite 600
23 Washington, D.C. 20006
24
25

1 **(Appearances Continued:)**

2 For the Defendant: Mr. Massimo Ciccarelli
3 Thompson & Knight, LLP
4 1722 Routh Street, Suite 1500
 Dallas, Texas 75201

5 Court Reporter: Ms. Lily Iva Reznik, CRR, RMR
6 501 West 5th Street, Suite 4153
7 Austin, Texas 78701
 (512) 391-8792

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09:11:15 1 THE COURT: Good morning, everyone. I'm sorry
09:11:16 2 I'm late.

09:11:17 3 Suzanne, would you be so kind as to call the
09:11:19 4 case, please.

09:11:20 5 THE CLERK: Sure.

09:11:22 6 Markman hearing in Civil Action 6:19-CV-680,
09:11:25 7 styled, Densys, Limited vs. 3Shape Trios A/S and 3Shape
09:11:31 8 A/S.

09:11:32 9 THE COURT: And if I could -- good morning.

09:11:34 10 If I could hear from counsel of record, please.
09:11:37 11 And I'm going to -- while you're announcing on the record,
09:11:39 12 I'm going to run back to my desk and grab a pen. I'm not
09:11:42 13 leaving you. So if I could hear from plaintiff's counsel
09:11:45 14 first.

09:11:48 15 MR. BURGER: Good morning, your Honor.

09:11:49 16 My name is Oded Burger. I'm from the New York
09:11:52 17 City office of Goldberg Segalla, and I represent the
09:11:54 18 plaintiff. Today with me is Ron Daignault, and he's also
09:12:00 19 from the New York City office of Goldberg Segalla.

09:12:01 20 THE COURT: Okay. Very good.

09:12:02 21 And will you be the primary speaker, both of you?

09:12:05 22 MR. BURGER: Yes, your Honor. I think Ron may
09:12:09 23 chime in, but I'll be doing the primary argument.

09:12:13 24 THE COURT: Very good.

09:12:14 25 And if I could hear from counsel for the

09:12:16 1 defendant.

09:12:19 2 MR. CICCARELLI: Good morning, your Honor.

09:12:19 3 This is Max Ciccarelli for 3Shape. As is
09:12:24 4 customary for me, I'll let other people that are more
09:12:26 5 intelligent than me do the speaking. And today, it's
09:12:28 6 going to be lead counsel Bill Belanger, Frank Liu and
09:12:33 7 Goutam Patnaik. And we also have a client representative
09:12:36 8 on the Zoom call, and I'll let Mr. Patnaik introduce him.

09:12:46 9 THE COURT: Mr. Patnaik, you're on mute.

09:12:48 10 MR. PATNAIK: Sorry. I got it. Sorry about
09:12:50 11 that.

09:12:50 12 I just wanted to introduce our two client
09:12:52 13 representatives. It's from our litigation department
09:12:55 14 within 3Shape. We have Thomas Kirkbak and we have Mads
09:13:00 15 Demenikov. They were both extremely interested in the
09:13:01 16 Markman process in U.S. litigation, and being in Denmark,
09:13:05 17 the Zoom gives us a nice opportunity for them to
09:13:08 18 participate.

09:13:08 19 THE COURT: Well, I hope we don't disappoint
09:13:13 20 them. I hope I get a decent Zoom review or, you know,
09:13:16 21 Yelp review. It will be my first international Yelp
09:13:19 22 review. This will be a good thing. So let me thank them
09:13:23 23 for attending.

09:13:24 24 I always try and make it a point to thank inhouse
09:13:29 25 attorneys and anyone who's from inhouse for taking the

1 time to attend. I think it's important folks see the
2 judicial process and see their lawyers and see -- frankly,
3 see how I handle my docket, as well. So I think it's a
4 very good thing that they're on the call. I appreciate it
5 very much.

6 So let's turn to typically the way I do my
7 Markmans, if you all have not had one in front of me yet,
8 especially since I've been giving preliminary
9 constructions is, I start with the plaintiff. I ask the
10 plaintiff on each proposed claim term their position with
11 respect to the Court's proposed or preliminary claim
12 construction. If the plaintiff says that they are -- they
13 find the proposal acceptable, then I move immediately to
14 the defendants to hear from them. If the plaintiff says
15 that they would like to have -- help me fix or amend my
16 proposal, then I let them go first, and I typically allow
17 defendants then to go second.

18 So starting with the claim construction from the
19 707 patent of, quote, an intra-oral fixed global
20 registration position inside the oral cavity, I would ask
21 plaintiff's counsel what your position is with respect to
22 the Court's preliminary construction, which is, quote, a
23 fixed position inside the oral cavity that is used as a
24 reference point for relating multiple sets of
25 three-dimensional data to a fixed global reference

09:15:10 1 coordinate system.

09:15:13 2 If the plaintiff -- I'll ask the plaintiff first.

09:15:16 3 MR. BURGER: Your Honor, for the plaintiff, we

09:15:19 4 agree with the Court's construction.

09:15:21 5 THE COURT: Okay. Then I'll hear from the

09:15:23 6 defendants, please.

09:15:26 7 MR. BELANGER: Thank you, your Honor.

09:15:29 8 And, your Honor, I think the issues regarding

09:15:33 9 this -- the construction of this term are simpler in terms

09:15:37 10 of the issues regarding the first maybe four terms for

09:15:43 11 construction.

09:15:44 12 And so, with your Honor's indulgence, I'd like to

09:15:48 13 give some background as to why we think the definition of

09:15:54 14 intra-oral fixed global registration position should

09:15:58 15 include a sequence for timing as to when that position is

09:16:01 16 fixed because we think that is the whole -- what the

09:16:05 17 patentee described as a point of novelty and what

09:16:09 18 plaintiffs themselves in their tutorial described as a

09:16:13 19 point of novelty.

09:16:13 20 So if that would be acceptable for me to start

09:16:15 21 with that background.

09:16:15 22 THE COURT: You can do whatever you'd like.

09:16:17 23 MR. BELANGER: Thank you, your Honor.

09:16:19 24 So I'd like to first start with slide 5, Jim.

09:16:28 25 MR. BURGER: Your Honor, I apologize for

09:16:29 1 interjecting. I'm going to have an objection to some of
09:16:32 2 the slides. And so, maybe before we proceed with the
09:16:37 3 slides, there are a number of slides that have taken
09:16:44 4 screen shots from the plaintiff's technology tutorial, and
09:16:48 5 my understanding is that that's not supposed to be a part
09:16:52 6 of the record, according to the Court's rules.

09:16:55 7 And so, we would object to slides 12 through 15
09:17:01 8 and 36 and 37 for that reason. So I apologize --

09:17:06 9 THE COURT: Well.

09:17:08 10 MR. BURGER: -- for not mentioning that when it
09:17:09 11 was my turn to speak.

09:17:10 12 THE COURT: That's okay. Let me see how the
09:17:13 13 defendant uses them, and then, I'll figure out whether I
09:17:15 14 want to allow them to be made part of the record. I
09:17:17 15 understand your objection and let me just see what is used
09:17:23 16 -- what they're used for, okay? And I may wind up
09:17:26 17 granting your objection. I appreciate you giving me a
09:17:29 18 heads up. But I'll hear from counsel and I'll need to see
09:17:32 19 the slides so I can make that decision.

09:17:36 20 MR. BELANGER: Thank you, your Honor.

09:17:36 21 And just -- well, I'll proceed with the argument
09:17:42 22 and can discuss that when I get to the slides. Actually,
09:17:46 23 if you'll turn to slide 6, Jim.

09:17:49 24 Your Honor, in terms of what this patent is
09:17:52 25 directed to, to orient the Court, this is a statement from

1 the background of the patent, a description from the prior
2 art. The concept of having a local coordinate space
3 within global coordinate space is simply a observation of
4 well-known mathematical concept.

5 And so, when the patent claim describes both
6 local coordinate space and a global coordinate space, by
7 definition the local coordinates are within the global
8 coordinate space, and that is simply an observation of the
9 mathematical relationship between physical objects.

10 We go to the next slide. So this is figure 1 of
11 the patent. And just to ground the Court in these
12 different terms and why we think they need to be related
13 in a particular way, the patent in the claims describe a
14 global coordinate space, which is simply the space which
15 -- within which a patient might be found. The claims then
16 in the specification describe this fixed global reference
17 coordinate system, which is not simply points in space,
18 but it is a coordinate system that is fixed from which
19 relevant measurements can be made. And there's also a
20 discussion of global reference coordinate systems, which
21 are essentially subsets of this fixed global reference
22 coordinate systems.

23 Go to the next slide, Jim. Actually, go to slide
24 8. Or slide 9, excuse me. So in the patent, the
25 left-hand column, your Honor, this is an excerpt from the

1 background of the patent. There's several prior art
2 techniques that are described in the background of the
3 patent. This is one of them. And there are generally two
4 types of prior art that the patentee distinguished over in
5 the background.

6 One type, you would have a reference point which
7 is outside the oral cavity, and it's not really relevant
8 to the dispute. But the second type of prior art which is
9 discussed, and I believe is relevant to the construction
10 of this term, is a series of prior art references that
11 disclose the use of reference points within a local
12 coordinate space or within the field of view. So this is
13 one piece of prior art that the patentee distinguished
14 over, and this shows camera 5 and it shows the reference
15 points 6, and they are within the field of view of the
16 camera 5.

17 And so, what the patentee acknowledges was known
18 in the art is the use of these reference points to
19 register and merge together multiple images or multiple
20 three-dimensional images that are taken from different
21 fields of view of the oral cavity. So this is
22 acknowledged as known in the prior art.

23 If you go to the prior slide, slide 8. What the
24 patentee goes on to describe and is a purported problem
25 with this approach where if the measuring and imaging data

1 is captured first and then, merely stitched together by an
2 analysis of the individual images, there's measurement
3 error and propagation error introduced. And so, this is
4 identified as one of the problems with those types of
5 prior art systems which do not have or do not start with
6 the fixed global reference point; rather, they use
7 reference points that are fixed in a local coordinate
8 space within the field of view.

9 And so, analyzing individual three-dimensional
10 images, according to the patentee in the background, and
11 simply stitching together or matching up those individual
12 three-dimensional images leads to various problems that
13 are identified. And so, if we go to slide 10, Jim. So in
14 order to allegedly overcome this problem, what the
15 patentee describes in the preferred embodiment is the use
16 of a fixed global reference point.

17 In this example, that's item 28. And again, in
18 an example that's shown as the origin of the fixed global
19 coordinate system, that's $Z_{sub G}$, $O_{sub G}$, $Y_{sub G}$. So
20 that $sub G$ is global, and item 28 is a fixed point. And
21 the preferred embodiment, again, there's a device that's
22 attached to the patient's mouth that's fixed. And then,
23 as far as distinguishing over the prior art, this allows
24 the measuring and imaging device to take all the
25 subsequent images and measurements with respect to that

09:22:50 1 fixed point.

09:22:51 2 So rather than having to later stitch together or
09:22:55 3 piece together various images that are taken from
09:22:58 4 different fields of view, without reference to the global
09:23:02 5 coordinate system, what the patentee describes is starting
09:23:05 6 with a fixed global coordinate system with a fixed initial
09:23:10 7 reference point, and then, taking all the subsequent
09:23:14 8 images and measurements with respect to that fixed point
09:23:18 9 within a global coordinate space.

09:23:22 10 If we go to the next slide. So this is, again,
09:23:28 11 what the patentee describes as their invention. So
09:23:33 12 contrary to some cases, your Honor, where this is simply a
09:23:39 13 description of a preferred embodiment, then this is what
09:23:42 14 the patentee describes as the novel aspects of their
09:23:45 15 invention. The key to their invention is that by fixing
09:23:51 16 that global reference coordinate and having a fixed global
09:23:55 17 coordinate space, that enables the real time and
09:23:58 18 discontinuous acquisition of measurements and images.

09:24:03 19 So by having that reference point 28, if an image
09:24:07 20 is taken within, in this example, a field of view which
09:24:10 21 does not include that fixed reference point, the system is
09:24:15 22 able to determine the physical location of that
09:24:21 23 measurement within this global coordinate space; and
09:24:24 24 that's in contrast, according to the applicant to the
09:24:28 25 prior art where the reference point would need to begin

09:24:30 1 that local field of view and could not be outside of the
09:24:34 2 field of view. And this is -- again, allegedly eliminates
09:24:40 3 the propagation errors and any other problem of taking
09:24:44 4 disparate images and stitching them together to create a
09:24:47 5 three-dimensional object.

09:24:47 6 If we can go to the next slide, Jim. So this is
09:24:52 7 the slide --

09:24:54 8 MR. BURGER: This is the slide that I would
09:24:55 9 object to, your Honor.

09:24:56 10 MR. BELANGER: I don't intend to introduce this
09:24:58 11 as evidence, your Honor. This is merely illustrative of
09:25:01 12 what we think is the dispute. And as your Honor saw from
09:25:04 13 the briefing, we believe that a sequence and an order is
09:25:08 14 required by the claims when read in view of the
09:25:11 15 specification and what the patentee described as its
09:25:14 16 invention.

09:25:16 17 But we think another issue which is raised by the
09:25:20 18 briefing is that the plaintiff, in certain instances,
09:25:25 19 agree that a sequence is required by the claims and in
09:25:32 20 other examples, disagree. So what we want from the
09:25:33 21 Markman process is a clear understanding as to whether
09:25:36 22 there is a sequence required or there's no sequence
09:25:40 23 required. If there's no sequence required, that would
09:25:42 24 open up a large field of prior art whereas if a sequence
09:25:45 25 is required, we believe that comports with the proposed

09:25:50 1 constructions and is different than the Court's
09:25:53 2 preliminary constructions for the reasons I'll try to
09:25:56 3 explain.

09:25:56 4 So this is an analogy that plaintiffs included in
09:26:00 5 their tech tutorial. I think it's just helpful for
09:26:04 6 understanding what the crux of this is. In this example,
09:26:08 7 taking a picture of the Austin courthouse by taking a
09:26:12 8 series of images, which are then, according to the
09:26:17 9 plaintiff, stitched together in a traditional manner by
09:26:21 10 analyzing each of the images and seeing how they fit
09:26:24 11 together. Think of this as you're putting together a
09:26:27 12 jigsaw puzzle, and if you don't know ahead of time where
09:26:30 13 the pieces go, you need to do some analysis of the jigsaw
09:26:34 14 puzzle pieces in order to fit them together.

09:26:37 15 If you go to the next slide. What the plaintiff
09:26:43 16 has said is the alleged novel aspect of the invention or
09:26:48 17 the central insight is to establish a fixed reference
09:26:53 18 point so that each time you take an image or you take a
09:26:57 19 measurement, you know where it goes in relation to other
09:27:00 20 points.

09:27:00 21 So in this example, they show you're taking one
09:27:03 22 picture of the Austin courthouse with respect to the top
09:27:07 23 of the roof. They put a red dot there. And by knowing
09:27:09 24 that where that red dot is before you take the pictures,
09:27:11 25 you can more easily piece them together.

09:27:19 1 If we could go to the next slide. So this is,
09:27:21 2 again, from the tutorial images showing that what I think
09:27:28 3 is consistent with the background, what the patentee
09:27:29 4 describes as their invention, is establishing this
09:27:31 5 reference point so that the measurement for distance or
09:27:36 6 the location of the measurement could be determined with
09:27:39 7 respect to that reference point.

09:27:41 8 Go to the next slide. Without any sequence, your
09:27:45 9 Honor, using that same example, the claims would be on
09:27:48 10 this admitted prior art approach where you're taking a
09:27:51 11 series of images, stitching them together and then, at
09:27:56 12 some later point in time, randomly assigning a reference
09:27:59 13 point, which then can be measured with respect to
09:28:04 14 individual images.

09:28:05 15 So in this analogy, if I took a panoramic view of
09:28:10 16 the courthouse, I analyze each image, fit the puzzle
09:28:14 17 pieces together in a way that is described as the
09:28:16 18 background of the prior art, I could then, at a later
09:28:19 19 point in time, simply identify the top of the courthouse
09:28:23 20 as a fixed global reference point, and it will be trivial
09:28:27 21 to measure how far each of the individual images were from
09:28:30 22 that point. We don't believe that that is what the
09:28:35 23 patentee described as their invention. And so, we think
09:28:38 24 the claims should be limited such that the reference point
09:28:41 25 is identified first, and the images are captured second.

1 However, we would respectfully submit that the
2 Court's construction should clarify this point so that
3 when we're evaluating prior art, it's either the claims
4 should be read in sequence, as we propose, or if there is
5 no sequence, the acknowledged prior art in many other
6 references would be covered because you're simply able to,
7 at any point in time, identify a fixed reference point
8 with respect to individually captured three-dimensional
9 images.

10 If we go to the next slide, please. So this --
11 actually, in the interest of time, I'll skip ahead. If we
12 can go to slide 20. This is, again, consistent with the
13 example given in the tutorial. This is an example from
14 plaintiff's expert's deposition where he explains the
15 importance of this fixed reference point and having it
16 fixed before the beginning of the imaging and measuring
17 process. He described this as an analogy to a drone with
18 a base station that once you fix the base station, it's
19 fixed for the entire measuring and imaging mission so that
20 you always know where the drone is with respect to the
21 base station.

22 If the claims are read without that sequence,
23 then that would open up a situation where you could simply
24 later piece together where the drone happened to be with
25 respect to the base station. But the base station could

09:30:14 1 be any random place, not a fixed place.

09:30:20 2 We can go to the next slide. And this is just to
09:30:23 3 highlight the point further, your Honor. This is from
09:30:25 4 plaintiff's reply brief where lawyer -- preliminary
09:30:29 5 construction says no sequence is required by the claims.
09:30:32 6 The plaintiff themselves argue for a sequence where the
09:30:37 7 acquisition step does not have to happen before the fixing
09:30:41 8 of the global registration position. However, they argue
09:30:45 9 that the later steps do require a consequence and require
09:30:50 10 that the global -- require the prior establishment of a
09:30:55 11 global reference position.

09:30:56 12 If I could go to slide 23. So the way we've
09:31:07 13 attempted to capture this in our proposed construction
09:31:10 14 and, I think, really the only difference in phrasing
09:31:13 15 between your preliminary construction and our proposed
09:31:19 16 construction is that the intra-oral fixed global
09:31:24 17 registration position is fixed prior to the measuring and
09:31:26 18 imaging. We believe that this is what the patentee
09:31:29 19 described as their invention, the patentee argued in the
09:31:32 20 background to distinguish over, acknowledged prior art.

09:31:36 21 And so, that's why we think it's appropriate to
09:31:39 22 say that this is -- to define in terms of claim
09:31:44 23 construction when this point must be fixed. Must it be
09:31:48 24 fixed before the imaging and measuring operation, or can
09:31:50 25 it simply be fixed at any later random point?

09:31:54 1 If I could go to slide -- the next slide, Jim.
09:31:56 2 So where this comes into most stark contrast, your Honor,
09:32:09 3 is with respect to claim 37. So with respect to claim 37,
09:32:14 4 you've got step (b), which uses the term "the measuring
09:32:20 5 and imaging device for measuring and imaging the
09:32:24 6 intra-oral objects, relative to same said intra-oral fixed
09:32:28 7 global registration position." And then, you have the
09:32:30 8 second step (c) which talks about the registration device,
09:32:34 9 relative to said same intra-oral fixed global registration
09:32:38 10 position.

09:32:39 11 So as we understand it, plaintiff has a --

09:32:41 12 MR. BURGER: Your Honor, I'll object that the
09:32:44 13 claim was not read properly.

09:32:50 14 MR. BELANGER: I am trying to do my best. If I
09:32:52 15 left out --

09:32:52 16 MR. BURGER: I apologize. You've left out some
09:32:54 17 words and I do believe that they're relevant. So I
09:32:58 18 thought it's important for the record to raise that
09:33:00 19 objection.

09:33:01 20 THE COURT: Okay.

09:33:03 21 MR. BELANGER: The claim as on the screen or are
09:33:06 22 you saying that the screen is not accurate?

09:33:07 23 MR. BURGER: No, no. Just what you were reading
09:33:09 24 out loud omitted some words. And so, I want to make sure
09:33:13 25 that the transcript is accurate.

MR. BELANGER: So the -- let me just back up and try to make that point clearly, your Honor.

There are two steps in claim 37. Both steps (b) and (c) use the identical phrase "relative to same said intra-oral fixed global registration position." Plaintiff and their expert and in the briefing admit that in step (c), relative to same said intra-oral fixed global registration position requires that the intra-oral fixed global registration position be fixed in advance of for step (c), recording global positions and orientations of said measuring and imaging device.

We believe for consistency, therefore, step (b) should, likewise, be read that the measuring and imaging device for measuring and imaging the intra-oral objects and features located in the oral cavity relative to same said intra-oral fixed global registration position requires that the measuring and imaging happen after the establishment of the intra-oral fixed global registration position. So this identical language is used in both.

Plaintiffs had argued that use of that language requires a sequence, and the sequence that is required is first establishing said intra-oral fixed global registration position prior to doing the measurement step. And so, we believe that same interpretation should apply for both. And therefore, for step (b), the intra-oral

1 fixed global registration must be fixed before the
2 measuring and imaging of the features in the oral cavity.

3 Go to the next slide, Jim. And this is
4 consistent, your Honor, with claim 1, as well, the
5 phrasing in the claim, and is consistent with what the
6 patentee -- this is on the right-hand side of slide 25
7 where the patent describes their invention, which is the
8 identification of this fixed global registration point in
9 advance of the imaging and measuring steps.

10 So with that, I would defer to plaintiff's
11 counsel and unless your Honor has any questions or
12 anything that you would like me to clarify.

13 THE COURT: Hold on one second.

14 Gentlemen, thank you for the -- whoops.
15 Gentlemen, thank you for the opportunity. I discussed it
16 with my clerks, who helped me prepare the preliminary
17 claim constructions. The Court is going to maintain its
18 construction of this claim term as "a fixed position
19 inside the oral cavity that is used as a reference point
20 for relating multiple sets of three-dimensional data to a
21 fixed global reference coordinate system."

22 I'll go ahead and put on the record that the
23 Court finds that there is no requirement in the claim for
24 a fixed position being defined inside the oral cavity
25 prior to measuring and imaging. And in fact, the Court

09:39:51 1 will go further, if it's helpful to you all on other claim
09:39:55 2 terms we're going to take up, to say that the Court is not
09:40:00 3 going to find that the claims require any sequencing, if
09:40:04 4 that helps with other arguments that are going to come
09:40:08 5 about.

09:40:09 6 The next claim term I have to take up is from the
09:40:15 7 707 patent claim, quote, a fixed global reference
09:40:21 8 coordinate system. The Court's construction is plain and
09:40:27 9 ordinary meaning wherein the plain and ordinary meaning is
09:40:30 10 a reference system used to define the locations of objects
09:40:37 11 in the inter-oral -- and that is "inter" because I noticed
09:40:42 12 that we have "inter" and "intra" occasionally. I want to
09:40:44 13 make sure that I state correctly on the record -- objects
09:40:47 14 in the inter-oral cavity and whose origin point is fixed
09:40:52 15 at a single location within the inter-oral cavity.

09:40:57 16 I'll hear first from the plaintiff. I know the
09:41:00 17 plaintiff submitted a proposed construction of plain and
09:41:03 18 ordinary meaning, but I want to find out whether or not
09:41:05 19 the Court's explanation of what a plain and ordinary
09:41:11 20 meaning should be is acceptable with plaintiff's counsel.

09:41:15 21 MR. BURGER: Your Honor, for the plaintiff, we
09:41:19 22 agree with the Court's construction. And in fact, we
09:41:21 23 submitted slides that demonstrate the support in the
09:41:28 24 specification that supports the Court's preliminary
09:41:32 25 construction.

09:41:32 1 THE COURT: Thank you very much.

09:41:34 2 With regard to defendant, I'll hear from you with
09:41:36 3 respect to any suggestions you have with what the Court
09:41:40 4 could do to improve or amend what it has proposed, or
09:41:45 5 whether or not you just agree with it as it is.

09:41:48 6 MR. BELANGER: I think, your Honor, consistent
09:41:50 7 with your -- the comment you just made, the primary issue
09:41:55 8 we have with the Court's proposed construction is clarity
09:42:00 9 on when the origin needs to be fixed. And our --
09:42:04 10 respectfully, our belief is, it should be fixed prior to
09:42:08 11 the measuring and imaging. But if the Court's ruling is,
09:42:10 12 it could be fixed at any time, there's no requirement of
09:42:13 13 timing, we would understand that. We just want clarity as
09:42:19 14 to that.

09:42:19 15 THE COURT: You have that clarity and you also --
09:42:22 16 and by the way, let me make absolutely clear on the
09:42:25 17 record. If you disagreed with my constructions, I
09:42:32 18 absolutely want you -- to make sure you keep that on the
09:42:34 19 record, I want -- I absolutely want to protect your
09:42:37 20 record. I'm -- I can do anything I want: that doesn't
09:42:43 21 mean I'm always right when I'm doing it at this time. So
09:42:46 22 I'm doing the best I can. Doesn't mean I'm absolutely
09:42:49 23 right.

09:42:50 24 However, so if the way the Court is going to take
09:42:55 25 what you said is that you would -- and I'll add in there

09:43:01 1 the word "respectfully disagree" with what I've said -- I
09:43:06 2 had a lawyer last week that gave me a grade of zero on one
09:43:08 3 of my claim constructions, so at least he didn't say that.

09:43:11 4 But I'm going to note for the record that you
09:43:13 5 disagree with the Court's decision that the claim does not
09:43:18 6 require any sequence, and you have that concern and
09:43:22 7 objection to the Court's proposal for what my plain and
09:43:25 8 ordinary meaning is.

09:43:25 9 Does the defendant have any other construction
09:43:28 10 they'd like -- I'm sorry, objection they'd like to raise?

09:43:32 11 MR. BELANGER: No. Not other than the sequencing
09:43:35 12 point that we've raised already, your Honor.

09:43:35 13 THE COURT: Okay. Well, then, with your consent,
09:43:37 14 I would probably move on to the next -- unless you have
09:43:40 15 something you want to add, I would move on to the next
09:43:42 16 claim term.

09:43:44 17 MR. BELANGER: That's fine, your Honor.

09:43:45 18 THE COURT: Okay. The next claim term is -- and
09:43:50 19 again, to make clear on the record because I don't know if
09:43:52 20 I said this out loud. Then the Court is going to adopt
09:43:56 21 and make permanent what I just read into the record as the
09:44:01 22 proposed construction for the claim term "a fixed global
09:44:06 23 reference coordinate system," noting the defendants'
09:44:10 24 objections with respect to their belief that it does
09:44:13 25 require sequence and the Court's determination it does

09:44:17 1 not.

09:44:18 2 The next claim term is from the 707 patent claim
09:44:23 3 1. The claim term is "a measuring and imaging device for
09:44:29 4 measuring and imaging the intra" -- that's I-N-T-R-A --
09:44:35 5 "intra-oral objects and features." The Court's
09:44:38 6 construction and determination is that it is not subject
09:44:42 7 to Section 112, paragraph 6, and that it should have its
09:44:47 8 plain and ordinary meaning.

09:44:47 9 I'll hear first from the plaintiff. I assume
09:44:51 10 because that was your proposal, as well, that you are okay
09:44:56 11 with the Court's. But I'll hear from you on the record.

09:44:58 12 MR. BURGER: That's correct, your Honor. Thank
09:45:00 13 you.

09:45:00 14 THE COURT: Okay. Now I'll hear from defendant
09:45:04 15 who believe that it was subject to Section 112, paragraph
09:45:09 16 6, and/or is indefinite. I'll hear from the defendant
09:45:14 17 with respect to the Court's determination and preliminary
09:45:16 18 construction.

09:45:17 19 MR. BELANGER: Thank you, your Honor.

09:45:19 20 Mr. Liu is going to take that term. But just one
09:45:23 21 clarification.

09:45:24 22 THE COURT: Yes, sir.

09:45:24 23 MR. BELANGER: Regarding the difference between
09:45:26 24 inter and intra-oral. I know you noted that there's a
09:45:30 25 difference, but it wasn't clear to us that that was --

09:45:36 1 LAW CLERK: That was my mistake. It's probably
09:45:39 2 supposed to be intra-oral.

09:45:39 3 THE COURT: Okay.

09:45:39 4 LAW CLERK: Yeah. So that's my mistake.

09:45:39 5 THE COURT: Yeah. I may be -- I may have
09:45:44 6 mistaken on what I'm reading here. If I'm misreading it,
09:45:47 7 let me know. That's why I was trying to pick it up.
09:45:49 8 There may be a mistake in what I have typed here. Let's
09:46:02 9 make sure that I have down what the appropriate -- what
09:46:05 10 the correct language is.

09:46:11 11 MR. BELANGER: So, your Honor, the claim language
09:46:14 12 itself is I-N-T-R-A, intra. And I believe your
09:46:20 13 preliminary uses an E, instead of an A. And so, I think
09:46:24 14 if we just replaced I-N-T-E-R with I-N-T-R-A, that would
09:46:30 15 comport with the claim language.

09:46:31 16 THE COURT: Okay. Very good. Thank you for
09:46:33 17 bringing that to my attention.

09:46:34 18 MR. BELANGER: Thank you, your Honor. And Mr.
09:46:37 19 Liu will address the next term.

09:46:38 20 THE COURT: Okay. Thank you. Thank you very
09:46:40 21 much.

09:46:41 22 MR. LIU: Good morning, your Honor.

09:46:42 23 THE COURT: Good morning.

09:46:45 24 MR. LIU: Frank Liu on behalf of the 3Shape
09:46:48 25 Defendants.

09:46:49 1 I'll be addressing --

09:46:49 2 THE COURT: I don't think I've had you in my
09:46:51 3 court before. Welcome. I'm glad to have you.

09:46:54 4 MR. LIU: Thank you, your Honor.

09:46:55 5 I'll be addressing the measuring and imaging
09:46:57 6 device limitation.

09:46:58 7 THE COURT: Okay.

09:46:59 8 MR. LIU: We believe the term "measuring and
09:47:02 9 imaging device" is one that's subject to 112, paragraph 6,
09:47:05 10 under prevailing Federal Circuit case law. And under 112,
09:47:10 11 paragraph 6, construction, we believe the specification
09:47:12 12 fails to provide an adequate disclosure of the
09:47:16 13 corresponding structure for the measuring and imaging
09:47:20 14 device, which would render the claim term indefinite.

09:47:22 15 I plan to address the threshold question of
09:47:26 16 measuring and imaging -- of whether the measuring and
09:47:28 17 imaging device is subject to 112, paragraph 6, first
09:47:31 18 unless the Court would like me to address any other
09:47:34 19 particular issues with respect to this term.

09:47:46 20 Jim, can you pull up slide 46? I think it's
09:47:57 21 helpful to review the standard governing the construction
09:48:01 22 under 112, paragraph 6. The recent Federal Circuit case
09:48:06 23 law confirms that the test for determining whether a term
09:48:10 24 is subject to 112, paragraph 6, is whether the claim term
09:48:14 25 connotes sufficiently definite structure. So if the claim

09:48:17 1 term fails to connote sufficiently definite structure,
09:48:21 2 then you need to identify the corresponding structure in
09:48:24 3 the specification for performing that claim function.

09:48:28 4 The Federal Circuit in the MTD Products vs. Iancu
09:48:34 5 case, which was --

09:48:34 6 THE COURT: Mr. Liu.

09:48:36 7 MR. LIU: Yes.

09:48:41 8 THE COURT: I found after two years now -- I'll
09:48:43 9 just go ahead and state on the record. I'm sure two years
09:48:44 10 ago, my patience would have been much greater, but I'll
09:48:48 11 tell you that I'm pretty current on this law. I deal with
09:48:55 12 this probably about four times a month at these Markmans.
09:48:59 13 So I don't mean to sound offensive but I'm -- my clerks
09:49:05 14 and I are really current on this, so you can probably
09:49:07 15 skip -- skip the case citations.

09:49:11 16 MR. LIU: Okay. Thank you, your Honor.

09:49:13 17 And I think just the most important point from
09:49:16 18 the MTD Products vs. Iancu case is that there's two
09:49:21 19 separate steps, and what it makes clear is that you can't
09:49:24 20 just go to the specification and point to some structure
09:49:27 21 and say 112, paragraph 6, applies. And I think that's the
09:49:30 22 relevant dispute here.

09:49:32 23 We think that Densys in their briefing and
09:49:35 24 argument is going straight to the specification,
09:49:38 25 identifying some structure that purports to correspond to

09:49:42 1 the measuring and imaging device and saying that's
09:49:47 2 sufficient to defeat 112, paragraph 6 -- to avoid a 112,
09:49:51 3 paragraph 6, construction. So we think that's the issue
09:49:53 4 here, and we think that's inconsistent with the recent
09:49:56 5 Federal Circuit case law on this.

09:50:06 6 Could we go to slide 48. Looking at the claim
09:50:16 7 language, it's clear that the measuring and imaging device
09:50:19 8 is recited in a means-plus-function format. While the
09:50:23 9 term doesn't use -- expressly use the term "means," it
09:50:28 10 takes the function that's recited, which is measuring and
09:50:32 11 imaging, and appends the nonce word "device" onto the end
09:50:36 12 of it. So essentially what they're doing is, they're
09:50:39 13 trying to claim any structure that falls within that can
09:50:45 14 perform the functions of measuring and imaging, and that's
09:50:50 15 consistent with how means-plus-function claims are
09:50:54 16 written. And there's nothing in the claim language to
09:50:57 17 suggest that there's some connotation of structure with
09:51:02 18 respect to the measuring and imaging device.

09:51:04 19 I think as the Court probably has seen the
09:51:10 20 Williamson vs. Citrix case, notes that terms like "device"
09:51:15 21 such as it's used here are typically insufficient to
09:51:20 22 connote structure. And so, we submit, your Honor, that
09:51:22 23 the term "measuring and imaging device" is a term that is
09:51:29 24 -- that fails to connote sufficient structure.

09:51:36 25 We'll also note on the record that the term

1 "measuring and imaging device" is not a term that has an
2 understood meaning in the art. There's no dictionary
3 definition or treatise that uses the term "measuring and
4 imaging device." So I think that highlights the fact that
5 measuring and imaging device is not a term that has an
6 understood meaning in the art, and that really, the
7 patentee is trying to just use the term "measuring and
8 imaging device" to refer to any structure that's being
9 used to perform the functions of measuring and imaging.
10 And again, that's consistent with how means-plus-function
11 claims are written. And we submit, your Honor, that that
12 would subject the claim term to 112, paragraph 6.

13 And if we go to slide 49. And the way that
14 measuring device and imaging device is claimed, it's
15 claimed consistently between the two independent claims.
16 So for in the previous slide, go to claim 37, they recited
17 that the measuring and imaging device was for measuring,
18 imaging the intra-oral objects and features located in the
19 intra-oral cavity, the same language appears in claim 1.

20 If we could go to slide 50. And consistent with
21 this means-plus-function claiming format, the
22 specification really describes the measuring and imaging
23 devices in terms of a black box. It illustrates
24 essentially a box in figure 1 of the specification. And
25 the intent by the patentee was really to signify that any

1 type of device or structure mechanism that could be used
2 for the measuring -- to perform the functions of measuring
3 and imaging device would be within the scope, and I think
4 that's largely confirmed by the specification.

5 If we could go to the slide 51. So looking at
6 the specification 707 patent at column 16, lines 22
7 through 44, it's apparent that the patentee had intended
8 to capture the measuring and imaging device in a
9 means-plus-function format when they recite the various
10 different types of mechanisms that could be used to
11 perform the functions of measuring and imaging. They
12 provide a long laundry list of mechanisms, and a lot of
13 these are from various disparate categories, and a lot of
14 them are very vague in nature.

15 So, for example, electronic -- electrical and
16 electronic mechanisms, those categories -- those
17 identified categories alone could virtually cover any type
18 of measuring and imaging device that performs the
19 functions of measuring and imaging.

20 And going to slide 52. And not to belabor the
21 case law, but I think the MTD Products vs. Iancu case
22 further highlights the fact that if there's nothing in the
23 specification to kind of -- to cabin the scope of the
24 functional term, it lends itself to the conclusion that
25 the claim was intended to be written as a

09:55:35 1 means-plus-function format.

09:55:36 2 And we think the specification's consistent with
09:55:38 3 that analysis. The specification provides a vague laundry
09:55:42 4 list of mechanisms that could be used, and it doesn't
09:55:45 5 really try to define any kind of particular scope or
09:55:50 6 suggest any kind of particular structure that would be
09:55:52 7 used for the means-plus -- for the measuring and imaging
09:55:55 8 device.

09:55:55 9 And so, virtually any structure that could
09:55:58 10 perform the functions of measuring and imaging would
09:56:03 11 theoretically fall within the scope of the measuring and
09:56:05 12 imaging device. And because of that, your Honor, we
09:56:13 13 believe that the term "measuring and imaging device" is
09:56:17 14 subject to 112, paragraph 6.

09:56:21 15 THE COURT: If I could hear a response.

09:56:26 16 MR. BURGER: Your Honor, were you addressing me?

09:56:32 17 THE COURT: You're the only other lawyer on --

09:56:37 18 MR. BURGER: Yes. There's a number of things
09:56:40 19 that Mr. Liu said that I'd like to clarify.

09:56:48 20 So first, he said that the defendants jumped
09:56:52 21 straight to the specification and ignored the claim terms,
09:56:56 22 and that's entirely untrue. In fact, I had a footnote
09:57:01 23 where I listed 38 structural elements of the measuring and
09:57:06 24 imaging device that are found in dependent claims. And
09:57:11 25 the claims that counsel put on the screen just now were

1 broad independent claims, but he didn't address the
2 dependent claims at all. And in fact, you'll see that the
3 structural limitations do appear in the claims, and we
4 have extensive briefing about why that means that 112,
5 paragraph 6 doesn't apply.

6 Let me -- if I may show you a few slides that
7 I've prepared. Just give me one moment to get that up.
8 All right. Before I get into some very specific
9 structural limitations that are found in the claims
10 themselves, I'd also like to correct something that -- a
11 different slide that counsel just showed, which was figure
12 1 of the 707 patent, and he highlighted a small purple box
13 to be the measuring and imaging device.

14 In fact, when we know from claim 53 that the
15 measuring and imaging device also includes a position and
16 orientation guide. And the position orientation guide is
17 a rod that is attached to the, you know, for lack of a
18 better term, the camera and other types of devices that
19 are specifically discussed as acquiring measurements and
20 images. And so, the specification tells us that this rod,
21 which is a part of the measuring and imaging device, can
22 be made out of plastic or glass and has limitations
23 relating to not irritating the intra-oral cavity.

24 So while this isn't the totality of the measuring
25 and imaging device, it is a part of the measuring and

09:59:47 1 imaging device, and it is certainly something that can
09:59:51 2 connotes structure. And this is illustrated here where, I
09:59:59 3 believe, the measuring and imaging device was highlighted
10:00:02 4 only as the box -- well, when counsel put the slide up, he
10:00:07 5 only highlighted box 54, but in fact, the measuring and
10:00:12 6 imaging device also includes a structural handle.

10:00:15 7 And so -- and beyond the portions of the
10:00:25 8 specification that counsel alluded to, there are other
10:00:32 9 portions of the specification that discuss the structure,
10:00:35 10 the measuring and imaging device. Indeed, we know that
10:00:38 11 the measuring and imaging device can be, quote, an
10:00:43 12 ultrasound measuring and imaging probe. And this is a
10:00:48 13 quote from the deposition transcript of defendants'
10:00:53 14 expert, Dr. Parris Egbert, where he agreed that an
10:00:58 15 ultrasound measuring and imaging probe has structure.

10:01:07 16 And so, let me think if there's any other points
10:01:15 17 I'd like to respond to. But just I suppose I'd ask your
10:01:20 18 Honor if there's anything that you'd like me to respond to
10:01:24 19 further.

10:01:31 20 THE COURT: No. I'm fine.

10:01:33 21 Mr. Liu.

10:01:34 22 MR. LIU: Yeah. And so, I'll take the points
10:01:36 23 that Densys' counsel raised.

10:01:40 24 So first, with regards to his response to the
10:01:44 25 argument that they're jumping straight into the

10:01:46 1 specification to find structure to avoid 112, paragraph 6,
10:01:50 2 I think their argument -- the arguments that they actually
10:01:52 3 made in the briefing, specifically, the footnote that they
10:01:55 4 pointed out, actually highlights that point.

10:01:58 5 The footnote that counsel referenced to that
10:02:05 6 footnote was merely referring -- was pointing, again, to
10:02:09 7 the specification to identify various structures, but we
10:02:14 8 know that it's improper to just go straight to the
10:02:19 9 specification, point out one or two example structures and
10:02:22 10 say 112, paragraph 6, doesn't apply.

10:02:24 11 The same thing also applies with regard to the
10:02:27 12 dependent claims. As you know, your Honor, dependent
10:02:33 13 claims further specify a term, but they don't purport to
10:02:37 14 limit the term in which it appears in the independent
10:02:41 15 claim. Put it another way, the various different
10:02:44 16 structures relayed in the independent claim, those aren't
10:02:47 17 limiting on the measuring and imaging device that's
10:02:52 18 recited in claim 1.

10:02:53 19 And so, we don't think that those dependent
10:02:56 20 claims actually help Densys' argument where providing any
10:03:03 21 type of meaningful scope as to the structure of the
10:03:08 22 measuring and imaging device.

10:03:10 23 Second point, Densys' counsel raised an argument
10:03:16 24 with regards to the position and orientation guide. As
10:03:20 25 counsel described it, it's essentially a rod that's

10:03:23 1 attached to the measuring and imaging device, and all its
10:03:29 2 function is is to move the device around. And that's not
10:03:32 3 actually relevant to the means-plus-function analysis
10:03:34 4 because in order to determine whether a structure --
10:03:39 5 whether a term connotes structure, you have to look at the
10:03:43 6 alleged structures and see if they're actually performing
10:03:45 7 the claim function.

10:03:46 8 Here, the claim function is measuring and imaging
10:03:51 9 intra-oral objects. It's clear that that position and
10:03:54 10 orientation guide is not performing that function. Its
10:03:57 11 whole purpose is just a rod attached to the measuring and
10:04:00 12 imaging device to move it around. So we don't think
10:04:02 13 that's relevant to the analysis.

10:04:05 14 And then, lastly, counsel raised the structure of
10:04:09 15 an ultrasound probe, and he cited to testimony from our
10:04:14 16 expert to apparently suggest that because our expert
10:04:20 17 acknowledged that one could conceivably understand what
10:04:23 18 the structure of an ultrasound probe is, that there would
10:04:28 19 be sufficient structure connoted to the term "measuring
10:04:32 20 and imaging device." And again, I think this is
10:04:33 21 consistent with the way that Densys has presented their
10:04:39 22 argument is, they just go straight to the specification,
10:04:42 23 identify various examples of structures and say 112,
10:04:46 24 paragraph 6, doesn't apply.

10:04:47 25 And again, we'd submit, your Honor, that that's

10:04:51 1 inconsistent with how recent Federal Circuit case law
10:04:57 2 addresses the means-plus-function analysis, and we request
10:04:59 3 that you disregard those arguments by Densys.

10:05:09 4 THE COURT: Thank you. I'll be back with you all
10:05:11 5 in just a couple of seconds.

10:05:40 6 I'd like to again, at this point, say what I say
10:05:43 7 a lot, which is, I'm always -- I'm very blessed to have
10:05:47 8 this job because I have really good lawyers who make these
10:05:52 9 arguments. They're very sophisticated and usually do a
10:05:58 10 very good job on both sides, and that was true here.

10:06:03 11 But the Court is going to maintain its
10:06:06 12 preliminary claim construction and make it a final claim
10:06:08 13 construction and find that this claim term is not subject
10:06:11 14 to Section 112, paragraph 6, and it is going to give it
10:06:16 15 its plain and ordinary meaning. It's going to find that
10:06:18 16 it is not indefinite.

10:06:23 17 I'm going to move on to the claim term from the
10:06:25 18 707 patent, which is "recording said global position of
10:06:30 19 said measuring and imaging device relative to said
10:06:34 20 intra-oral fixed global registration position" and
10:06:38 21 "measuring and recording global positions and orientations
10:06:42 22 of said measuring and imaging device" related -- "relative
10:06:47 23 to same said intra-oral fixed global registration
10:06:50 24 positions."

10:06:51 25 The plaintiff's construction was plain and

10:06:54 1 ordinary meaning for both terms. The Court has adopted
10:06:56 2 that. I assume -- I'll start with the plaintiff. I
10:06:59 3 assume that the plaintiff is okay with the Court's
10:07:03 4 preliminary construction.

10:07:04 5 MR. BURGER: Yes, your Honor.

10:07:05 6 THE COURT: I'll hear from defense counsel.

10:07:13 7 MR. BELANGER: I was on mute. I apologize, your
10:07:15 8 Honor.

10:07:15 9 I'd like to start, your Honor, by going to slide
10:07:25 10 29. And I think the crux of the dispute, your Honor, is
10:07:35 11 whether this term "relative to" requires some knowledge
10:07:46 12 within the system of the relationship between the
10:07:52 13 measuring and imaging device and the intra-oral fixed
10:07:57 14 global registration position; and by simply saying that
10:08:01 15 the term has its plain and ordinary meaning may not
10:08:04 16 resolve that dispute.

10:08:07 17 If there -- in our mind, two ways that this could
10:08:13 18 be read. One way would be that it's simply acknowledging
10:08:19 19 a law of nature, which is every local portion of the mouth
10:08:29 20 has some relation to every other portion of the mouth. So
10:08:35 21 in this example in figure 1, it shows a field of view K
10:08:40 22 where you're taking a measurement and image of certain
10:08:45 23 teeth, and then, it shows apart from that, this intra-oral
10:08:50 24 global -- fixed global registration position.

10:08:53 25 In our understanding, the entire discussion in

10:08:57 1 the patent is that a measurement or calculation is
10:09:01 2 performed so that the system knows where the measuring and
10:09:07 3 imaging device is relative to that fixed global
10:09:11 4 registration position when it takes the measurement.

10:09:17 5 In the broadest reading of "relative to," you
10:09:20 6 could eliminate that item 74, which is showing some
10:09:24 7 communication or calculation and simply say, I'm taking a
10:09:31 8 local measurement, and that local measurement by
10:09:34 9 definition is relative to all other points in the mouth.
10:09:39 10 And so, respectfully, your Honor, we think clarification
10:09:41 11 on that point would be helpful.

10:09:45 12 We propose a construction where there was a
10:09:48 13 measurement required because that is what the patentee
10:09:50 14 describes when describing the novel aspects of the
10:09:54 15 invention. That's what plaintiff's tutorial describes as
10:09:57 16 the novel aspect of the invention is performing a
10:10:01 17 measurement between the measuring and imaging device and
10:10:03 18 that fixed global reference point.

10:10:06 19 But we understand the Court's construction of
10:10:09 20 plain meaning. We're just concerned that may not resolve
10:10:12 21 the dispute as we may hear plaintiff later try to
10:10:15 22 distinguish the prior art by observing that there's no
10:10:18 23 measurement or calculation performed to determine how far
10:10:25 24 away the measuring and imaging device is from some other
10:10:27 25 fixed point within the oral cavity.

10:10:34 1 And just in summary, your Honor, we don't believe
10:10:36 2 there's any description other than a measurement.
10:10:39 3 Plaintiffs in their brief and their slides point to a
10:10:42 4 calculation, but in this art, the calculation is simply
10:10:47 5 another way to describe the measurement when the end
10:10:53 6 result of the calculation is an indication of relative
10:10:56 7 position between two points.

10:10:58 8 Unless your Honor has additional questions.

10:11:04 9 THE COURT: Thank you very much. I'll be right
10:11:05 10 back. Thank you for that break.

10:12:18 11 The Court is going to go with plain and ordinary
10:12:20 12 meaning for both terms and -- but the Court wanted to put
10:12:23 13 a couple of things on the record, as well. The Court is
10:12:34 14 concerned that "measured from" doesn't really add
10:12:43 15 anything, doesn't -- isn't really -- doesn't really focus
10:12:46 16 down or help very much. And also, I mean -- and I say
10:12:52 17 that in the context -- not to take that. I'm saying that
10:12:56 18 -- which is kind of a fraction of a thought, but in the
10:12:59 19 context of the way that the briefing was done and the
10:13:03 20 suggestion that use of the words "imaging device measured
10:13:10 21 from" would assist in correcting any problems there were
10:13:13 22 with the claim language, the Court finds that does not --
10:13:17 23 it is not helpful.

10:13:18 24 And also, just because of the conflict between
10:13:26 25 the plaintiff's construction of ordinary meaning and the

10:13:30 1 defendants' constructions here, their proposed, the Court
10:13:33 2 finds for purposes of you all going forward that the
10:13:36 3 defendants' proposed constructions would not be the plain
10:13:41 4 and ordinary meaning of these claim terms for purposes of
10:13:44 5 dealing with your experts.

10:13:45 6 I will move on to patent claim 707 with regard to
10:13:56 7 registering local coordinate -- it says -- I skipped -- I
10:14:01 8 should have included this. I should have included
10:14:05 9 everything. There is a little letter (f) and then, it
10:14:07 10 says "registering local coordinate space pixel positions
10:14:11 11 in each of said plurality of globally recorded
10:14:16 12 three-dimensional measurements and images with
10:14:19 13 corresponding global coordinate space pixel position."

10:14:25 14 And then also, we're thinking we may be able to
10:14:33 15 skip this one, given what we discussed earlier, but I
10:14:36 16 would ask counsel if that's correct. Not that you don't
10:14:40 17 want to maintain the concerns that you raised earlier, and
10:14:43 18 I would keep those on the record, but our sense is that we
10:14:48 19 will cover those. But let me make clear, if either side
10:14:51 20 wants to make any argument about either, I'm completely
10:14:55 21 open to hearing it at this time.

10:14:58 22 MR. BELANGER: Yes --

10:14:59 23 THE COURT: So I'll start -- go ahead. I'm
10:15:00 24 sorry. Go ahead, please.

10:15:02 25 MR. BELANGER: Do you want to start with me or

10:15:04 1 plaintiff?

10:15:04 2 THE COURT: Yes. That will be fine.

10:15:06 3 MR. BELANGER: Thank you, your Honor.

10:15:06 4 So I think you're correct. This was a sequence
10:15:09 5 of steps argument which we put forward in the briefing. I
10:15:15 6 would just note for the record, we think the argument as
10:15:18 7 of this phrase, the sequence is imparted in part by the
10:15:22 8 discussion of the novelty of the patent, which I addressed
10:15:25 9 earlier in my argument but, also, just based on a plain
10:15:29 10 reading of the language where step (f) requires something
10:15:34 11 that is -- does not exist until the performance of step
10:15:39 12 (e), which is this plurality of globally recorded
10:15:44 13 three-dimensional measurements. But it is an argument
10:15:47 14 about sequence.

10:15:48 15 And so, respectfully, we understand the Court's
10:15:50 16 ruling. Happy to answer any questions that are unique to
10:15:54 17 this term, but I think it is the same.

10:15:55 18 THE COURT: Okay. And I'll put on the record at
10:16:00 19 a macro level again, the Court doesn't believe sequencing
10:16:05 20 is required. On a micro level with respect to this
10:16:08 21 specific claim term, the Court specifically does not
10:16:10 22 believe that (f) is required to occur after step -- for my
10:16:16 23 court reporter, that little letter (f) must occur after
10:16:21 24 step little letter (e). I know I sound like I'm talking
10:16:26 25 to third graders. I'm just trying to make sure it's clear

10:16:28 1 on the record for Lily what I'm trying to say here.

10:16:32 2 The defendants' construction was -- I'm just
10:16:36 3 going to quote the first part of it -- little "(f) after
10:16:38 4 step (e), registering local coordinate space pixel
10:16:43 5 positions." The Court specifically finds the steps do not
10:16:48 6 have to -- steps do not have to take place in that
10:16:51 7 specific order, and will note obviously the defendant
10:16:56 8 proposed that so they -- that they thought that was
10:16:59 9 correct. And so, your objection to my construction would
10:17:03 10 be sustained -- would be noted for the record.

10:17:06 11 The Court will go with plain and ordinary meaning
10:17:09 12 without an ordering of steps. Do you think I've
10:17:13 13 sufficiently preserved for you your concerns for the
10:17:17 14 record with regard to the claim construction?

10:17:19 15 MR. BELANGER: I believe so, your Honor. Thank
10:17:22 16 you.

10:17:22 17 THE COURT: Okay. Thank you.

10:17:23 18 Next claim term, the 707 patent has, quote,
10:17:30 19 mobile registration device for measuring and recording
10:17:34 20 global positions and orientations of said measuring and
10:17:39 21 imaging device. The plaintiff has proposed plain and
10:17:44 22 ordinary meaning. The defendants propose that the claim
10:17:47 23 term is subject to 35 United States Code, Section 112,
10:17:53 24 paragraph 6. The Court's preliminary construction is that
10:17:55 25 it is not subject to 112, paragraph 6, and that plain and

10:18:01 1 ordinary meaning should be what the Court imposes.

10:18:05 2 I'm assuming from the plaintiff that the
10:18:08 3 plaintiff accepts what the Court has proposed; is that
10:18:11 4 correct?

10:18:11 5 MR. BURGER: Yes, your Honor.

10:18:13 6 THE COURT: Okay. I'll hear from defendant.

10:18:16 7 MR. BELANGER: Your Honor, I think the issue here
10:18:20 8 is similar in that we believe 112, 6 should apply to this
10:18:27 9 claim term. The arguments are similar. I'm happy to --
10:18:31 10 and Mr. Liu is prepared to present those arguments if it
10:18:34 11 would be helpful to the Court, but I think it is the same
10:18:37 12 issue where we believe this claim phrase is merely
10:18:44 13 functional language with a term thrown at the beginning
10:18:46 14 that doesn't have any recognized structure.

10:18:50 15 THE COURT: Let me say this. This is y'all's
10:18:53 16 Markman hearing. If Mr. Liu has anything he'd like to
10:18:57 17 add, in addition to what he argued earlier, he is
10:18:59 18 absolutely welcome to do that, and I'll hear from
10:19:02 19 plaintiff's counsel. If your argument is essentially
10:19:08 20 pretty much what you argued earlier, I think I'm pretty
10:19:11 21 familiar with the law on this, and I know why I made this
10:19:18 22 preliminary construction. But I'm absolutely -- Mr. Liu's
10:19:21 23 free to make any argument that he'd like to make. So just
10:19:24 24 let me know.

10:19:27 25 MR. BELANGER: Yeah. I think I'll let Mr. Liu

10:19:29 1 just briefly address the issue, your Honor, so it could be
10:19:31 2 on the record.

10:19:31 3 THE COURT: Sure. Please do.

10:19:33 4 MR. LIU: Yeah. And I appreciate the
10:19:36 5 opportunity.

10:19:36 6 I won't belabor the point, but I think the
10:19:40 7 argument is similar. I think it's actually here, the term
10:19:43 8 is, you know, one step even more removed than the
10:19:47 9 measuring and imaging device. Mobile registration device
10:19:51 10 is not a term of art. There's no evidence that it's --
10:19:56 11 there's no evidence, either in the form of a dictionary
10:20:00 12 definition or a treatise, to suggest that it connotes some
10:20:02 13 type of well-understood structure. Again, it's a verbal
10:20:10 14 construct that with the term "device," which is a nonce
10:20:14 15 term, appended to the end of it.

10:20:16 16 And if you look at the structure of the claim --
10:20:18 17 and, Jim, can you pull up slide 67? Oh, sorry, 62. I
10:20:31 18 apologize. The language of the claim after mobile
10:20:40 19 registration device is purely functional language. It
10:20:44 20 recites the function of measuring and recording global
10:20:47 21 positions and orientations of the measuring and imaging
10:20:50 22 device. It doesn't provide any -- it doesn't purport to
10:20:52 23 provide any structure or providing that measurement or
10:20:56 24 recording of the global positions of the measuring device.
10:20:59 25 It just recites a pure function. And we submit, your

10:21:04 1 Honor, that's, again, pure means-plus-function claiming.

10:21:09 2 And going to the next slide, slide 64. Sorry,
10:21:20 3 the next slide, 64. And again, the specification confirms
10:21:24 4 this. Again, the way that the specification describes the
10:21:30 5 mobile registration device, it merely provides a laundry
10:21:33 6 list of broad and vague mechanisms that could be used to
10:21:38 7 perform the function of measuring and recording the global
10:21:43 8 positions of the measuring and imaging device.

10:21:45 9 Again, it gives the example of electrical and
10:21:51 10 electromechanical mechanisms, and we submit, your Honor,
10:21:54 11 that those descriptions are extremely vague and don't
10:21:59 12 really provide any guidance as to what the corresponding
10:22:02 13 structure would be to perform the function of measuring
10:22:07 14 and recording the global positions of the measuring and
10:22:10 15 imaging device.

10:22:14 16 And with respect to that, I think that's -- as
10:22:21 17 you can see, it's very similar to the mobile registration
10:22:27 18 -- sorry, the measuring and imaging device term. And I'll
10:22:29 19 pass to plaintiff's counsel to see if he has any comments.
10:22:34 20 Or if you have any questions, your Honor, I'd be glad to
10:22:37 21 address them.

10:22:38 22 THE COURT: Sounds great.

10:22:40 23 Does plaintiff's counsel have anything they'd
10:22:42 24 like to put on the record?

10:22:43 25 MR. BURGER: Your Honor, it seems from what I'm

10:22:47 1 hearing that you're very familiar with the briefs. Unless
10:22:54 2 you have a question about what defense --

10:22:57 3 THE COURT: I don't. No. I don't.

10:22:58 4 I just want to give you -- I gave Mr. Liu an
10:23:01 5 opportunity to put whatever he wants on the record as to
10:23:03 6 why I'm wrong. And if you have anything you'd like to put
10:23:09 7 on the record to address what he said specifically, you're
10:23:12 8 free to. If not, I'm happy to rule and move on to the
10:23:14 9 next term.

10:23:15 10 MR. BURGER: I obviously don't agree with what
10:23:18 11 Mr. Liu said, but I think that the reasons why I disagree
10:23:21 12 are plain from our briefs. So I will rest on what is
10:23:27 13 contained in our briefs.

10:23:28 14 THE COURT: Very good. That's fine.

10:23:30 15 The Court is going to find that that claim term
10:23:32 16 is not subject to Section 112, paragraph 6, and give it
10:23:37 17 the claim construction of plain and ordinary meaning.

10:23:40 18 The next claim term that we have up is from the
10:23:44 19 768 patent, which is the claim term "sector." The
10:23:49 20 plaintiff has proposed plain and ordinary meaning. The
10:23:52 21 Court has adopted plain and ordinary meaning for the word
10:23:57 22 "sector."

10:23:58 23 The defendant has proposed "region defined by two
10:24:04 24 radii at" -- I hope I said that correctly. Josh, did I
10:24:08 25 get close? "Radii at a given angle to each other." And

10:24:13 1 so, I'll hear -- I'm going to guess this is from Mr. Liu.
10:24:19 2 But I could be wrong.

10:24:21 3 MR. PATNAIK: Actually, you are wrong, your
10:24:23 4 Honor. It's Mr. Patnaik.

10:24:26 5 THE COURT: I'm equally happy to hear from you.
10:24:30 6 So I invite you to say whatever you'd like in support of
10:24:34 7 your proposed construction.

10:24:36 8 MR. PATNAIK: Thank you, your Honor.

10:24:37 9 Real quick, I just -- I am looking at plain and
10:24:41 10 ordinary. We actually tried to expound on the plain and
10:24:46 11 ordinary, or actually put forth we used extrinsic evidence
10:24:47 12 like dictionary definitions and our expert. Plaintiff in
10:24:51 13 advocating plain and ordinary, it's curious to us because
10:24:54 14 we don't think that's actually advocating plain and
10:24:54 15 ordinary. If you look at their briefing, your Honor, and
10:24:58 16 I'll be specific. In their reply submission -- in their
10:25:01 17 responsive claim construction brief, they criticize 3Shape
10:25:05 18 for using the geometric definition of sector.

10:25:08 19 So I would argue, your Honor, today, that if you
10:25:12 20 look at what they're actually saying, they're not saying
10:25:15 21 plain and ordinary. They're saying plain and ordinary
10:25:16 22 when you have to carve out geometric. They're
10:25:19 23 acknowledging that the geometric definition of sector is
10:25:22 24 what we have propounded.

10:25:23 25 So we would like some clarity because we don't

10:25:27 1 think what plaintiff actually said in their briefs or
10:25:29 2 their expert declaration is plain and ordinary. And
10:25:32 3 again, I'll be specific with their declaration. Dr. Baja
10:25:39 4 at paragraph 48 of his expert declaration says very
10:25:43 5 plainly, establishes that the word "sector" is not being
10:25:47 6 used in the geometric sense.

10:25:49 7 So there's no, as far as we can see in the
10:25:52 8 specification or the patent, otherwise, any disavowal of
10:25:55 9 this geometric sense. In fact, the patent is sprinkled
10:25:59 10 with references to the geometric context that this full
10:26:04 11 patent is being read within. So it was curious to us that
10:26:08 12 they're saying plain and ordinary, but not geometric, but
10:26:12 13 at the same token, it leaves a dispute outstanding, your
10:26:16 14 Honor. And I'll leave it at that.

10:26:19 15 THE COURT: That's a good argument. Give me one
10:26:21 16 second, I'll be right back. I appreciate the issue -- let
10:31:53 17 me go back on the record.

10:31:54 18 I appreciate the issue that defense counsel has
10:31:56 19 raised and we believe -- I believe that a word like
10:32:02 20 "sector," absent some compelling reason -- and I don't
10:32:07 21 think defendant is even arguing there is a compelling
10:32:09 22 reason here to give it a construction -- should be given a
10:32:13 23 construction beyond plain and ordinary meaning.

10:32:16 24 That being said, I certainly understand the
10:32:21 25 defendants' concern with the wording that was used in the

1 plaintiff's brief. And I understand the plaintiff's
2 concern with the proposed construction in defendants'
3 brief, given that this is a three-dimensional -- a patent
4 that involves three dimensions.

5 So the Court, when we enter our claim
6 construction order, we will -- we'll make clear -- we will
7 amplify what is meant by plain and ordinary meaning to
8 help you all when you're preparing with your experts. But
9 the Court is going to maintain a claim construction of
10 plain and ordinary meaning. And I appreciate defense
11 counsel bringing to the Court's attention what the concern
12 was with that claim term. And the Court will do its best
13 to address that in the order based on what was said in the
14 briefs.

15 With regard to the next claim term in the 768.

16 MR. PATNAIK: Your Honor, before we go on, could
17 I just make one clarification point?

18 THE COURT: Sure.

19 MR. PATNAIK: You brought up the idea of the
20 distinction because it's 3-D, and that was curious to me
21 because going through the plaintiff's briefs, we thought
22 it was very conclusory for their expert to say there's
23 some distinction between a sector in 2-D versus 3-D. We
24 didn't see any real support for it; it was just kind of
25 said. And the easy example that comes to mind is a

10:33:47 1 sphere. That's 3-D and a sphere will have a sector, as
10:33:50 2 well.

10:33:50 3 So, you know, I know that distinction was made,
10:33:53 4 but we didn't really understand the point that was being
10:33:55 5 made. And I just want to make sure that -- that doesn't
10:33:59 6 go unaddressed because it wasn't something that was really
10:34:02 7 honed in on.

10:34:05 8 THE COURT: Well, let me make clear. The Court
10:34:08 9 rarely, very rarely -- and won't probably in this
10:34:13 10 instance -- relies on extrinsic evidence. And so, I
10:34:17 11 understand your concern. I'm pretty well on the record
10:34:23 12 that, you know, I do my best to look at the intrinsic
10:34:27 13 evidence and the specification. And that's why I'm saying
10:34:30 14 with regard to a word like "sector," that here, my
10:34:38 15 philosophy is -- generally speaking is this.

10:34:40 16 That when someone is -- when an attorney is doing
10:34:45 17 their best -- when they are prosecuting the patent and
10:34:48 18 they're doing best to capture the intention of the
10:34:52 19 inventor, they -- and they're drafting it, I think there
10:34:57 20 are words and selections of words and phrases that they
10:35:01 21 use where they would understand and anticipate that if the
10:35:07 22 patent is granted, that there might be a challenge and
10:35:10 23 that they need to define those claim -- that those words
10:35:13 24 need to be construed. They could do that in the
10:35:17 25 specification, you know, all that stuff.

1 But on the other hand, when a person is drafting
2 a patent, trying to capture an invention and they use a
3 word like "sector" that, in my opinion, they anticipate
4 everyone skilled in the art, generally speaking, to know
5 unless they have to disavow something during the
6 prosecution or, in this case, if the patent involved a new
7 way of creating sectors and they had to explain what the
8 word "sector" meant, I'm very reluctant to go down the
9 road of construing a word like "sector," you know, or a
10 word like "pole," which I've been asked to do, you know,
11 or "pipe." You know, I don't do that.

12 On the other hand, I understand your concern that
13 you have a concern based on the briefing that was done by
14 the plaintiff. I don't want you all, if I can avoid it,
15 to get to the point where your experts are coming up with
16 and opining in their reports and at depositions on whether
17 or not there's infringement or whether or not there's
18 invalidity because of some confusion over what the word
19 "sector" means.

20 We are going to do our best when we draft the
21 order to make it as clear as possible what we think the
22 plain and ordinary meaning of "sector" is. Failing that,
23 then I anticipate I might receive Daubert motions or
24 motions for summary judgment down the road if one of you
25 -- if one of you believes the other side's experts has

1 taken a position on what the word "sector" means in the
2 context of this patent that is not -- that should not fall
3 within the plain and ordinary meaning.

4 So let me move on to the next claim term, which
5 is "identifiable positional characteristic." The
6 plaintiff's construction is plain and ordinary meaning.
7 The defendants' construction is that it is indefinite
8 under 35 United States Code, Section 112, 6 -- paragraph
9 6. The Court's proposed construction is, it is not
10 subject to Section 112, paragraph 6. And I'll say this in
11 part for the benefit of the defendants and they have
12 clients on board.

13 I think we have only once found in this situation
14 when a defendant made the proposal that something was
15 subject to Section 112, paragraph 6, that it, indeed, was.
16 So it is probable -- I'm probably in the 98 percent
17 category of rejecting these arguments, and so, it's
18 consistent with my general philosophy of patent law.

19 The Court's construction here is that claim term
20 "identifiable positional characteristic" of plain and
21 ordinary meaning is "a characteristic of the reference
22 surface device that facilitates the conversion of 2-D
23 images to 3-D models." I'll hear first from the plaintiff
24 as to whether or not you are satisfied with the Court's
25 interpretation of what the plain and ordinary meaning is.

10:38:49 1 MR. BURGER: Thank you, your Honor.

10:38:50 2 This is the term where we proposed a slight
10:38:57 3 modification. I have some slides for what our proposal is
10:39:02 4 for what the plain and ordinary meaning of the term means
10:39:07 5 and slides relating to the spec support. Here we are.
10:39:25 6 And can you guys see my screen at this point? All right.
10:39:34 7 I'll take the silence as a yes.

10:39:36 8 So, your Honor, we do agree with the first
10:39:44 9 portion.

10:39:44 10 THE COURT: Give me one second because I'm
10:39:48 11 looking right now at your proposal, and I may take it and
10:39:55 12 modify your proposal a little bit. So let me work on that
10:40:00 13 for just a second here and come back to you all with
10:40:03 14 perhaps a modification of what the Court's preliminary
10:40:06 15 construction was, based off of what the plaintiff
10:40:11 16 suggested. Give me just one second.

10:40:14 17 MR. BURGER: Thank you, your Honor.

10:41:37 18 THE COURT: Allow me to go back on the record.

10:41:39 19 I am going to take what the plaintiff has
10:41:43 20 suggested. I am going to change the word "stitching"
10:41:48 21 because I don't think that necessarily helps the jury
10:41:51 22 because I might have to explain to them what stitching
10:41:54 23 means, but I'm going to use it as the foundation. And the
10:42:01 24 Court is now going to offer and so the defendant knows
10:42:05 25 what it's arguing against, and I'll see if the plaintiff

10:42:09 1 is okay with this. Plaintiff will get to go first and
10:42:12 2 tell me if I've gotten it wrong.

10:42:15 3 A characteristic of the reference surface device
10:42:19 4 that facilitates conversion of a 2-D image to 3-D models
10:42:24 5 or combining -- and I'm using the word "combining" rather
10:42:28 6 than the proposed word "stitching" -- "a first
10:42:32 7 three-dimensional model to a second three-dimensional
10:42:35 8 model."

10:42:35 9 So let me hear from the plaintiff first and ask
10:42:39 10 if you are satisfied with that proposed claim
10:42:42 11 construction.

10:42:45 12 MR. BURGER: Yes, your Honor. The substitution
10:42:47 13 of the word "combining" for the proposed word "stitching"
10:42:51 14 is acceptable to the plaintiff.

10:42:53 15 THE COURT: Okay. So let me turn, then, to
10:42:56 16 defense counsel and hear any arguments you have why the
10:43:01 17 Court's proposed construction, which is the one I just
10:43:06 18 gave with regard to "combining" in it, is incorrect.

10:43:11 19 MR. LIU: Yes, your Honor. This is Frank Liu on
10:43:14 20 behalf of the defendants.

10:43:15 21 So the language that was proposed -- and at the
10:43:22 22 outset, we'd just note that our original proposed
10:43:25 23 construction was not 112, paragraph 6. It was actually
10:43:28 24 intended just to be an indefiniteness under 112, paragraph
10:43:32 25 2. So we apologize if there's any confusion around that.

10:43:37 1 And after receiving the Court's preliminary
10:43:41 2 construction, we took a look at it, and we thought that
10:43:46 3 the Court's preliminary construction was helpful in
10:43:53 4 providing what the understanding of the plain and ordinary
10:43:55 5 meaning. However, we believe that the addition that's
10:43:58 6 been just proposed would improperly attempt to import a
10:44:07 7 preferred embodiment into the claims.

10:44:10 8 And so, just to be clear, defendant would be fine
10:44:16 9 with the language -- or with the construction, "a
10:44:20 10 characteristic of the" --

10:44:22 11 THE COURT: Mr. Liu, let me ask you something.
10:44:24 12 You've touched on something that I always gotta be careful
10:44:31 13 how I say it. You look so young to me that I was going to
10:44:35 14 say something like I've been practicing law longer, but I
10:44:38 15 won't. But I probably have been practicing law longer
10:44:42 16 than any of you have been alive. But I never --

10:45:01 17 MR. PATNAIK: Your Honor, we've lost audio for
10:45:04 18 you.

10:45:06 19 THE COURT: Oh, can you hear me now?

10:45:11 20 MR. PATNAIK: It's muffled. It's muffled and
10:45:14 21 distorted.

10:45:16 22 THE COURT: Okay. Let me do this then. I'm
10:45:25 23 going to log out and log back in.

10:45:28 24 MR. BURGER: Your Honor, it appears to have
10:45:29 25 resolved.

10:45:30 1 THE COURT: Very good.

10:45:33 2 So what I was saying is, I don't know that it's
10:45:37 3 not a good argument or a legitimate argument. I've just
10:45:42 4 never -- Mr. Liu, I've never heard a defendant concerned
10:45:44 5 that a plaintiff was importing a limitation from the
10:45:50 6 specification into a claim construction because typically,
10:45:57 7 you know, that's a narrowing of what -- the argument
10:46:01 8 against doing that philosophically is if the claim is
10:46:05 9 broad and a defendant -- the claim is usually -- the
10:46:08 10 argument's usually going the other way. The plaintiff is
10:46:11 11 saying, Judge, you can't use that construction because
10:46:13 12 it's a limitation. My claim is actually broader and they
10:46:17 13 want to limit it. Why would a defendant care if the
10:46:21 14 plaintiff -- I'm not saying it's right or wrong, but why
10:46:25 15 can't a plaintiff do that? I guess I've just never heard
10:46:29 16 anyone make that argument before.

10:46:32 17 MR. LIU: And let me see if I can explain.

10:46:33 18 THE COURT: Okay.

10:46:34 19 MR. LIU: So the language that Densys' counsel
10:46:39 20 proposed, the portion of the specification that they cite
10:46:44 21 to, which is column 6, lines 58 through column 7, line 11,
10:46:53 22 that's where the limitations of the first
10:46:56 23 three-dimensional model to a second three-dimensional
10:46:59 24 model come from.

10:46:59 25 And in that part of the specification -- and,

10:47:06 1 Jim, can I actually get that pulled up onto the screen?

10:47:33 2 Sorry. Can we get the 768 patent? So, Jim, can you blow
10:47:58 3 up column 6, lines 58 through 7, 11?

10:48:23 4 MR. BURGER: Frank, I have the slide where you
10:48:25 5 can see the entire portion that we're relying on, if you'd
10:48:29 6 like it, I can just throw that up. It might be easier for
10:48:34 7 everyone to see.

10:48:37 8 MR. LIU: That's fine. Jim, if you already have
10:48:42 9 -- it seems like your --

10:48:44 10 MR. BURGER: Here. I just think this might be
10:48:51 11 simpler since you're referring to what we submitted.

10:49:00 12 MR. LIU: Thank you, Oded. I appreciate that.

10:49:05 13 Yeah. And so, this is the relevant portion of
10:49:09 14 the specification that plaintiff's counsel cited to for
10:49:13 15 support for the limitation, which makes reference to the
10:49:19 16 first three-dimensional model to a second
10:49:22 17 three-dimensional model. If you can see the first line of
10:49:26 18 that portion, it begins with furthermore, according to
10:49:30 19 some embodiments of the present invention, there is
10:49:32 20 provided a method for producing a three-dimensional model
10:49:35 21 of an intra-oral scene. And then, it goes on to list the
10:49:40 22 various steps of this method.

10:49:42 23 And as you can see in steps -- step (e), it
10:49:50 24 recites the first two-dimensional image of the
10:49:54 25 three-dimensional -- of the intra-oral scene, including a

10:49:56 1 first reference surface and at least one identifiable
10:50:00 2 positional characteristic.

10:50:03 3 Step (f) is where it recites obtaining a first
10:50:06 4 three-dimensional model from a two-dimensional image. And
10:50:11 5 step (h) recites obtaining a second three-dimensional
10:50:14 6 model from the --

10:50:16 7 THE COURT: Mr. Liu, can I ask you a question?
10:50:19 8 Since I'm -- since I am saying what plain and ordinary
10:50:26 9 meaning means and I'm looking at what you're saying here,
10:50:31 10 how would -- and I'm using the word "combining" instead of
10:50:36 11 "stitching," but how would combining, which is in the
10:50:41 12 specification, combining the first three-dimensional model
10:50:46 13 to the second three-dimensional model not be part of the
10:50:49 14 plain and ordinary meaning if it's disclosed in the
10:50:53 15 specification?

10:50:54 16 I mean, I guess we could quibble on whether or
10:50:59 17 not I ought to include that language in my claim
10:51:03 18 construction and that might even go to whether or not it
10:51:06 19 helps a jury or doesn't help a jury. But even if I left
10:51:09 20 that language out of my explanation of what a plain and
10:51:15 21 ordinary meaning is for the 768 patent, how would that
10:51:19 22 possibly not be part of the plain and ordinary meaning of
10:51:25 23 what's covered here by identifiable positional
10:51:30 24 characteristic when it's discretely disclosed?

10:51:35 25 MR. LIU: Well, your Honor, I think that the

1 Court's original construction of a characteristic of the
2 reference surface device that facilitates conversion of
3 2-D images to 3-D models, we think that's a clear and
4 concise definition for the identifiable positional
5 characteristic. We think by injecting the additional
6 language "or combining a first three-dimensional model to
7 a second three-dimensional model," that injects some
8 ambiguity into the claim language because now it takes
9 away that original requirement of the reference surface
10 device facilitating the conversion of 2-D images to 3-D
11 models.

12 THE COURT: Mr. Liu, let me try this. Let me go
13 back to the plaintiff for a second. Plaintiff's counsel.

14 MR. LIU: Yes, your Honor.

15 THE COURT: I am, frankly, agnostic probably
16 whether I include the language that you have proposed in
17 that the Markman is to do two things. One is to make
18 certain you all know what is -- what I think the claim
19 term means, and the other's possibly to benefit the jury
20 in explaining what they otherwise might not understand.

21 I can tell you on the record right now -- and
22 we'll have a transcript of this so you can remind me of
23 this when we get to trial and I may have forgotten it.
24 But as far as I'm concerned, stitching or combining the
25 first three-dimensional model to the second

10:53:21 1 three-dimensional model as is in the specification is part
10:53:26 2 of the plain and ordinary meaning of identifiable
10:53:29 3 positional characteristic.

10:53:31 4 If you don't care -- if me having said that, do
10:53:36 5 you care whether or not I include it in the construction I
10:53:40 6 have, which is going to go to the jury?

10:53:44 7 MR. BURGER: Yes --

10:53:45 8 THE COURT: Because I am --

10:53:45 9 MR. BURGER: I apologize.

10:53:47 10 THE COURT: No. Please.

10:53:47 11 MR. BURGER: No. I actually believe that it's
10:53:49 12 important and I have a slide to explain why.

10:53:51 13 THE COURT: Okay.

10:53:52 14 MR. BURGER: Previous slide and that's -- this is
10:53:55 15 the portion of the specification that speaks to the way
10:54:02 16 that the identifiable positional characteristic relates to
10:54:07 17 driving 3-D information from 2-D images. But it's
10:54:14 18 important that the spec uses the word "typically" there.
10:54:18 19 It is sometimes the case, but it is not always the case.
10:54:22 20 And the instances when it is the case relate to structured
10:54:29 21 illumination, which is a way of getting 3-D information
10:54:33 22 from 2-D images.

10:54:34 23 But the spec is very clear that this invention
10:54:40 24 does not only relate to instances when this reference
10:54:47 25 surface device is being used with the structured

1 illumination. And the cite, for your Honor's benefit, for
2 how structured illumination is not the only way in order
3 to get 3-D information in the context of this invention is
4 -- the cite I'd like to give you is column 1, lines 39
5 through 56. There are other cites, as well, that I don't
6 have at my fingertips, but that cite is very clear that
7 structured illumination is not required. I believe, in
8 fact, that some of the defendants' briefing even agrees
9 with that point.

10 And so, that's why this word "typically" that
11 we're looking at the portion of the specification at
12 column 10, lines 23 through 36, the fact that it uses the
13 word "typically," I think that, again, the identifiable
14 positional characteristic can be used for this purpose,
15 but this is not the only purpose for which the
16 identifiable positional characteristic is disclosed. And
17 that is why I believe the Court's explanation as to what
18 the plain and ordinary meaning should include the other
19 sense, which is disclosed at column 6, line 58 through
20 column 7, line 11.

21 MR. DAIGNAULT: Yes, your Honor. This is Ron
22 Daignault speaking.

23 Further to counsel's point, one of the things
24 that we believe is that as the Court construed plain and
25 ordinary meaning, or illuminated what plain and ordinary

10:56:44 1 meaning is, we would just respectfully submit that it
10:56:47 2 actually is limiting to the 2-D, 3-D concept, and that it
10:56:50 3 would be excluding the combining or stitching that's
10:56:53 4 talked about in the spec.

10:56:54 5 So that's -- so in addition to what Mr. Burger
10:57:00 6 mentioned and the fact that it talks about typically, our
10:57:05 7 issue really was that on its face, it just seemed that the
10:57:08 8 Court was limiting the construction. We understand from
10:57:10 9 the Court's comments that you would be including the
10:57:13 10 combining, stitching as part of plain and ordinary
10:57:16 11 meaning.

10:57:17 12 So if the jury, though, only sees the portion
10:57:20 13 about 2-D, 3-D, then they may not appreciate that you have
10:57:24 14 this combining aspect, too, which is actually embodiment
10:57:27 15 in the patent and would be excluded arguably from the
10:57:32 16 construction.

10:57:37 17 THE COURT: Okay. If I could hear from
10:57:40 18 whoever -- I apologize. I forgot who it was that was
10:57:42 19 arguing on behalf of defendant. Mr. Liu, I think.

10:57:46 20 MR. LIU: Yes, your Honor.

10:57:47 21 And if I may comment on that point. And I think
10:57:52 22 one point I wanted to make clear was that the modified
10:58:00 23 construction uses the term "or." So in other words,
10:58:08 24 they're effectively not going to require the identifiable
10:58:13 25 positional characteristic to require a characteristic of

1 the reference surface device that facilitates conversion
2 of 2-D images to 3 models. We believe that the
3 specification, particularly the portion that plaintiff's
4 counsel put up on 10, lines 23 through 36, provides that
5 requirement for the conversion of the 2-D image just to
6 the 3 models.

7 That being said, we don't believe that once you
8 -- with that being said, we're not trying to read out the
9 -- we're not trying to preclude them from subsequently
10 relying upon combining first three-dimensional model to a
11 second three-dimensional model.

12 So just at a high level, the way that this works
13 is that you have your structured illumination, you create
14 these two-dimensional images and you generate a
15 three-dimensional model. That three-dimensional model is
16 only a small portion of the object. And in order to
17 capture the full three-dimensional model, you need to
18 capture multiple of these. So you would have multiple 2-D
19 images that you convert to 3 models, and then, you can
20 subsequently stitch them together to create entire
21 three-dimensional model.

22 So I guess more simply put, I think we would be
23 okay with the modification if instead of using the term
24 "or," you use the word "and" combining the first
25 three-dimensional model to a second three-dimensional

10:59:55 1 model.

11:00:03 2 THE COURT: Okay. The Court is going to go with
11:00:06 3 the proposal that I read that included the word "capable."
11:00:11 4 And I don't think the change of the word from "and" --
11:00:14 5 from "or" -- I'm sorry, combined and I don't think Mr.
11:00:18 6 Liu's correct when he says it should be "and" rather than
11:00:21 7 "or." I think "or" is appropriate.

11:00:24 8 So let's move to the next claim term, the 768
11:00:29 9 patent. Claim term is "a plurality of faces" and "each
11:00:34 10 face of said plurality of faces at an angular orientation
11:00:37 11 with respect to each adjacent face." The Court's proposed
11:00:43 12 construction is plain and ordinary meaning. Defendants'
11:00:47 13 obviously is much more robust. I'll hear from whoever is
11:00:51 14 going to speak on behalf of defendants with respect to
11:00:54 15 their construction -- or their proposed construction.

11:00:58 16 MR. PATNAIK: Your Honor, this is Mr. Patnaik
11:01:00 17 again on this one.

11:01:00 18 So on this one, I'm mindful of your earlier words
11:01:04 19 about how you generally construe terms. We do have a very
11:01:08 20 strong indication in the specification here of the
11:01:11 21 patentee actually acting as his own lexicographer and
11:01:15 22 putting forth certain properties with respect to the
11:01:17 23 claims that are used in the claim -- or the terms that are
11:01:20 24 used in the claim, and I'll specify claim 10.

11:01:22 25 So the dispute at its crux is that defendants are

11:01:26 1 putting or 3Shape is putting in this "substantially plane"
11:01:31 2 language, and I think that's where the dispute is. I'll
11:01:33 3 let plaintiff speak for themselves, but from our
11:01:36 4 understanding of the briefing, that's the crux of the
11:01:38 5 dispute.

11:01:38 6 When -- and our use of "substantially plane"
11:01:41 7 comes actually from the guidance in the specification when
11:01:44 8 it's talking about the properties of the referenced
11:01:48 9 surface device, and it uses the face that's the subject of
11:01:51 10 these -- of this claim term. And so, I'm looking at
11:01:55 11 column 10, your Honor, lines 44 through 57. And this is
11:01:59 12 where the patentee discusses substantially plane, and they
11:02:03 13 end the paragraph, it's not simply about an embodiment,
11:02:06 14 which I understand is the beginning of the paragraph, but
11:02:09 15 the end of that paragraph states very clearly the term,
11:02:12 16 quote, reference surface device, end quote, herein denotes
11:02:17 17 a device where apparatus having at least these properties.

11:02:19 18 So these properties are, in fact, read into the
11:02:24 19 overarching. I mean, claim 1 is all about this reference
11:02:27 20 surface device. So what we were trying to do with the
11:02:29 21 language in our construction was ensure that that property
11:02:33 22 that's the subject of this paragraph was actually captured
11:02:36 23 in the construction.

11:02:45 24 Your Honor, I mean, that's the crux of my
11:02:47 25 argument. I think the additional points I would make, in

11:02:51 1 plaintiff's briefing, they quibbled with our use -- they
11:02:54 2 pointed to the pyramid examples as how our construction
11:02:57 3 couldn't be possibly correct. The pyramid example,
11:03:02 4 actually, your Honor, is exactly what we're saying because
11:03:04 5 each of the faces of the pyramid are substantially planar.

11:03:06 6 And you could see that if you look at figure 6A.
11:03:11 7 It points to 605. 605 is described in column 15 as a
11:03:16 8 face, and all we're saying is, even in the pyramid
11:03:19 9 structure that those individual faces, they comport with
11:03:22 10 the requirements of the claim, but they are still
11:03:25 11 substantially planar.

11:03:26 12 The other point that plaintiffs use to argue
11:03:32 13 against our construction is the dependent claim 16, which
11:03:36 14 talks about the length being an arch. Again, we think
11:03:39 15 that's completely consistent and not mutually exclusive at
11:03:42 16 all with our substantially plane construction insertion
11:03:46 17 because if you look, for instance, at figure 6A and 6B,
11:03:50 18 those, we would argue, are -- the length is in the shape
11:03:54 19 of an arch so -- and that's the pyramidal structure. So
11:03:57 20 -- and that by definition, by the patent specification
11:04:01 21 tells you that there are different angles for each of the
11:04:04 22 pyramidal structures, and it comports with the rest of the
11:04:07 23 claim requirements.

11:04:08 24 So I'll leave it that, your Honor, unless you
11:04:11 25 have any questions. But I did want to address the two

11:04:13 1 points raised by plaintiffs against our construction.

11:04:22 2 THE COURT: Yeah. I'll hear a response from the
11:04:25 3 plaintiff. And I'm happy to hear with regard to the issue
11:04:30 4 -- on the suggestion with regard to the pyramids.

11:04:38 5 MR. BURGER: Your Honor, if I could have control.
11:04:39 6 Yeah, okay. I do have slides that illustrate this point.
11:04:47 7 Just one moment.

11:05:01 8 The pyramidal depression is addressed not only in
11:05:09 9 the specification but, also, in claim 2. And here, you
11:05:12 10 see that where the word "face" appears in the next to the
11:05:23 11 last line of this quote of claim 2. It says wherein each
11:05:30 12 face of said plurality of faces includes a pyramidal
11:05:37 13 depression. So the use of the word "face" there, a face
11:05:41 14 that has a pyramidal depression is not a face that it's
11:05:49 15 substantially plane. So even within the context of the
11:05:51 16 claim, the use of the word "face" is inconsistent with
11:05:57 17 having -- being substantially plane. It tells us that it
11:06:03 18 includes a pyramidal depression.

11:06:04 19 So what this tells me is that the use of the word
11:06:08 20 "face" in the context of the claims and the specification
11:06:13 21 is broader than the substantially plane face. And indeed,
11:06:19 22 where the claims require substantially plane face, they do
11:06:26 23 include that; but in other contexts, they just mention
11:06:31 24 faces.

11:06:35 25 And so, I think the use of the word "face" as it

11:06:42 1 appears very clearly in claim 2 is that it's a surface,
11:06:49 2 and so, the surface has a pyramidal depression. And
11:06:54 3 another -- I was thinking of another example that might
11:06:58 4 help the Court. When one speaks about the face of a
11:07:01 5 cliff, no one -- there's a face of a cliff is not
11:07:08 6 substantially plane, but yet, we talk about it as a
11:07:11 7 surface as a face.

11:07:12 8 And I believe that that is the sense in which the
11:07:15 9 claims use the word "face." And I do have other points to
11:07:23 10 make, but I believe your Honor wanted me to respond
11:07:27 11 specifically to the pyramidal depression.

11:07:32 12 THE COURT: Okay. If y'all will give me just one
11:07:34 13 second.

11:09:27 14 Okay. I'm back on the record. Thank you for
11:09:29 15 your courtesies in letting me take a short break to chat
11:09:31 16 about this with my law clerks.

11:09:34 17 The Court is going to maintain its construction
11:09:38 18 of plain and ordinary meaning. And also, having heard the
11:09:42 19 arguments that were made by defendants' counsel with
11:09:45 20 respect to how the claims should be construed, the Court
11:09:50 21 rejects those and finds that the effort that you are
11:09:55 22 making regarding to including "each substantially plane
11:10:00 23 surface at an angular orientation relative to an adjacent
11:10:05 24 substantially plane surface" would not be -- that a person
11:10:09 25 skilled in the art would not find that to be the plain and

1 ordinary meaning or the correct construction of that claim
2 term.

3 The Court is going to make as its final and
4 permanent construction that it be plain and ordinary
5 meaning. Hold on one second. I want to put on the record
6 that we believe the specification shows the ability to map
7 curved surfaces. So to the extent that the defendants'
8 proposal would indicate that the specification does not
9 allow that or the claim does not include that, the Court
10 rejects that proposed construction.

11 The final claim term we have is "orientation
12 indicium" and "position indicium." The Court's claim
13 construction proposal is plain and ordinary meaning.
14 Defendants' proposed construction is that the claim term
15 is either indefinite or is indefinite under 35 United
16 States Code, Section 112, paragraph 2.

17 The Court's preliminary construction is the
18 defendant is incorrect. It is not subject to Section 112,
19 paragraph 2, and that plain and ordinary meaning is the
20 appropriate construction for both "orientation indicium"
21 and "position indicium." I'll hear from counsel for
22 defendant, please.

23 MR. LIU: Yes, your Honor.

24 We've taken a look through the Court's proposed
25 construction, and I think it helps give clarity as to what

1 the plain and ordinary meaning is for the orientation
2 indicium and the location indicium. And I guess, one
3 point that we wanted to seek clarification on is with
4 respect to the language "allows a viewer to ascertain the
5 orientation of the reference surface device."

6 And so, in our understanding of the claimed
7 invention, the purpose of the reference surface device is
8 to use orientation indicium and position indicium to
9 ultimately determine three-dimensional points. And the
10 orientation indicium and the position indicium are going
11 to be points or orientation in the two-dimensional images
12 that are captured and that are subsequently process. So
13 in terms of the characteristic, we believe that it's more
14 consistent with the invention that's described in the 768
15 patent to have that the reference surface device is using
16 the orientation of the reference surface device with
17 respect to the intra-oral cavity as opposed to merely
18 allowing it to just be a viewer to ascertain the
19 orientation of the reference surface device.

20 THE COURT: Okay. Let me hear a response from
21 the plaintiff.

22 MR. BURGER: I have to apologize, your Honor.
23 I'm not really clear what counsel is proposing. I can
24 tell you why I believe the construction that your Honor
25 has proposed is supported by the patent specification, but

11:14:01 1 I think I need --

11:14:01 2 THE COURT: Okay. I've got it. Let me -- that's
11:14:04 3 my fault. So let me go ahead and do this.

11:14:07 4 Mr. Liu, so let me read to you for the record
11:14:13 5 with respect to orientation indicium, I'm going to read
11:14:17 6 what the Court's proposal is, and then, I'm going to have
11:14:21 7 you tell me what language you would like to add or delete
11:14:25 8 to clarify my proposal. And then, I'll hear from
11:14:30 9 plaintiff's counsel.

11:14:30 10 So the plain and ordinary meaning -- and this
11:14:33 11 will be true for both of them. Orientation indicium is a
11:14:37 12 characteristic of the reference surface device that allows
11:14:41 13 a viewer to ascertain the orientation of a reference
11:14:45 14 surface device with respect to the inter-oral cavity.

11:14:50 15 You mentioned that you had an issue with the
11:14:53 16 portion of it that begins with "allows" and ends with
11:14:57 17 "surface device." Tell me how you would propose modifying
11:15:02 18 the Court's preliminary construction so that I can hear
11:15:04 19 from plaintiff's counsel.

11:15:08 20 MR. LIU: Sure. And I think the most -- simply
11:15:11 21 that the dispute is really over whether it's -- the
11:15:18 22 reference surface device is something that allows a viewer
11:15:21 23 to ascertain the orientation or the position of the
11:15:24 24 reference surface device or whether it's a system that's
11:15:27 25 being used to ascertain the orientation or position of the

11:15:31 1 reference surface device.

11:15:33 2 We submit, your Honor, that consistent with the
11:15:36 3 spec -- teachings of the 768 patent, the whole purpose of
11:15:40 4 the reference surface device is to allow the computer
11:15:43 5 system to ascertain what the orientation or position of
11:15:49 6 the reference surface device is so that you can use that
11:15:53 7 to determine three-dimensional points of the object that
11:15:59 8 you're scanning.

11:16:00 9 And so, I think that's the clarification that we
11:16:03 10 seek, and we believe that's consistent with the
11:16:06 11 specification. And so, we would be fine if you just
11:16:13 12 replaced the word "viewer" with "system."

11:16:17 13 THE COURT: So -- and as you're talking, I think
11:16:22 14 I am persuaded that "allows a viewer" may be unnecessarily
11:16:27 15 restrictive. And I understand why it may be a viewer
11:16:32 16 that's looking at it, but it may be the system that is
11:16:36 17 providing it. Let me put you on mute for just a second,
11:16:46 18 and we'll see what we can do on our side. Give me one
11:16:56 19 second.

11:17:42 20 Okay. So here is what I'm going to try modifying
11:17:48 21 this to. I'll start with Mr. Liu and ask if this
11:17:54 22 satisfies what you're trying to accomplish. For both of
11:17:57 23 them in the section that says, allows a viewer to
11:18:02 24 ascertain the orientation, I would modify that to read, a
11:18:07 25 device that allows for the ascertainment of the

11:18:13 1 orientation. And that will be for both claim terms.

11:18:27 2 MR. LIU: I believe we would be fine with that
11:18:28 3 clarification, with the additional clarification that it's
11:18:35 4 not intended to allow just any viewer to look at the
11:18:39 5 reference surface device and, in their head, be able to
11:18:43 6 ascertain the orientation or the position, but rather,
11:18:49 7 it's the system that's viewing it and making that
11:18:55 8 determination.

11:18:58 9 THE COURT: Let me -- I'm going to hold off on
11:19:01 10 the addition that you'd like. But let me hear from
11:19:03 11 plaintiff's counsel with respect to my modification of my
11:19:07 12 preliminary construction.

11:19:09 13 MR. BURGER: Your Honor, I believe that we are in
11:19:13 14 agreement with your modified construction.

11:19:18 15 THE COURT: And I'm going to go out on a limb
11:19:21 16 here and guess that you'd prefer for me not to add the
11:19:25 17 language that Mr. Liu suggested that I add.

11:19:27 18 MR. BURGER: I actually don't understand, again,
11:19:30 19 what Mr. Liu has proposed, specifically. But in terms of
11:19:38 20 what you laid out, I am in agreement.

11:19:44 21 THE COURT: Okay. If you all will give me just a
11:19:46 22 second. Okay. Thank you very much for the break.

11:22:53 23 The Court is going to go with the modified
11:22:56 24 proposal it came up with this morning for orientation
11:23:03 25 indicium. The construction's going to be plain and

11:23:06 1 ordinary meaning as a characteristic of the reference
11:23:09 2 surface device that allows for the ascertainment of the
11:23:15 3 orientation of a reference surface device with respect to
11:23:19 4 the inter-oral cavity.

11:23:20 5 With respect to position indicium, the Court is
11:23:24 6 going to go with a characteristic of the reference surface
11:23:28 7 device that allows for the ascertainment of the
11:23:33 8 orientation -- allows the ascertainment of the position of
11:23:39 9 the reference surface device within the inter-oral cavity.

11:23:43 10 So that is --

11:23:47 11 MR. BURGER: Your Honor.

11:23:48 12 THE COURT: And there's -- my clerk said we might
11:23:52 13 want to have intra-oral, rather than inter, if that is --
11:23:57 14 so I'm going to say intra-oral cavity.

11:24:01 15 MR. BURGER: That is precisely what I was going
11:24:03 16 to say.

11:24:04 17 THE COURT: Very good. Okay.

11:24:06 18 So that ends the Markman hearing, which allows us
11:24:11 19 to turn to a trial date. The Court is going to -- unless
11:24:19 20 you all -- if you can look at your calendars, unless you
11:24:23 21 all have a prior court engagement, in terms of a trial on
11:24:28 22 June 21st of next year, that is when the case is going to
11:24:34 23 be set for trial.

11:24:37 24 I don't need you to tell me today. If, for some
11:24:40 25 reason, one of you finds out, one of your lead counsel

11:24:43 1 determines that they're unavailable because they have a
11:24:45 2 previously set trial date, I will modify that date by a
11:24:50 3 little bit to accommodate anyone's trial date. In my
11:24:57 4 court, just letting you know how it works, if it's set for
11:25:01 5 the 21st, that means you should plan to -- on the Thursday
11:25:05 6 or Friday before the trial starts to have the voir dire
11:25:10 7 with my magistrate.

11:25:13 8 The reason I do the voir dire with my magistrate
11:25:15 9 is because it's much better for the parties in my opinion.
11:25:20 10 The magistrate judge is very good. He's very experienced.
11:25:23 11 He's been there for more than two terms. He will do
11:25:28 12 probably a 45-minute to one-hour voir dire first, and
11:25:34 13 then, each side will have a 45-minute voir dire per side
11:25:50 14 to do their own --

11:25:50 15 MR. PATNAIK: Your Honor, you're distorted
11:25:52 16 again --

11:25:53 17 THE COURT: -- usually happens in this case, I
11:25:55 18 will be going with a seven-person jury. The jury -- okay.
11:26:00 19 Give me one second. Are you able to hear me now?

11:26:10 20 MR. PATNAIK: We are.

11:26:11 21 THE COURT: Very good. Thank you for letting me
11:26:13 22 know.

11:26:13 23 You'll have a seven-person jury. You'll each get
11:26:17 24 four strikes on your venire. And then, Monday, July --
11:26:22 25 I'm sorry, Monday, June 21st at 9:00, we'll start trial

11:26:26 1 with opening arguments. So that pretty much is everything
11:26:31 2 I think we need to do.

11:26:34 3 Does the plaintiff have anything that we needed
11:26:37 4 to address?

11:26:39 5 MR. BURGER: No, your Honor.

11:26:40 6 THE COURT: Counsel for defendant?

11:26:45 7 MR. PATNAIK: No, your Honor.

11:26:46 8 THE COURT: And just so you know, I didn't think
11:26:53 9 I would have to say this back in March, but we're actually
11:26:56 10 going to trial in Waco. I know there's some questions
11:26:59 11 about the other places about when, but we're going back --
11:27:02 12 we're having trials. And so, I don't know what will be
11:27:06 13 happening in the rest of the world in June, but unless
11:27:08 14 there's some dramatic reversal in the trend of COVID,
11:27:12 15 we'll be going to trial in person on that date.

11:27:19 16 But I look forward to working with you on this
11:27:21 17 case throughout. If you have anything that I need to help
11:27:23 18 you with, take up during discovery, anything like that, I
11:27:27 19 think your counsel knows well, I'm always available and
11:27:30 20 I'm happy to help. Make sure that everything stays on
11:27:33 21 track.

11:27:34 22 MR. BURGER: I'm sorry, your Honor. I just
11:27:35 23 wanted to clarify one thing from earlier.

11:27:38 24 THE COURT: Sure.

11:27:39 25 MR. BURGER: I apologize. I may have spoken

11:27:41 1 before you were ready to be done. I apologize about that.

11:27:44 2 Just for the purpose of the record, I did have an

11:27:47 3 objection that the slides from the technology tutorial

11:27:56 4 should not be a part of the record. I'm wondering if --

11:27:59 5 THE COURT: I will -- generally speaking here,

11:28:04 6 let me tell you, I'm going to overrule, but let me explain

11:28:07 7 why. I don't think that the plaintiff -- I'm sorry. I

11:28:11 8 don't think that the defendant used it in a way that I'm

11:28:13 9 typically concerned with, which is, I don't want an

11:28:18 10 engineer to come in at a tutorial and say, the way we

11:28:25 11 drill for oil is we go down -- and whatever I'm going to

11:28:29 12 say, I know some of you are going to laugh at me because

11:28:32 13 I don't know anything about oil and gas. But, you know, I

11:28:33 14 don't want an expert to say, you know, fracking means this

11:28:37 15 and then, it turns -- just because he's trying to give me

11:28:40 16 a big picture, and then, it turns out fracking, you know,

11:28:43 17 as much -- I'm not going to allow people to be

11:28:47 18 cross-examined over something that they said generically

11:28:50 19 to help me to be educated that wasn't -- as much as you

11:28:56 20 guys worry about getting experts to say exactly what they

11:29:00 21 mean.

11:29:00 22 But in your case where I think the defendant just

11:29:03 23 took something that you were using to help me understand

11:29:07 24 something and tried to use it to help me understand it

11:29:10 25 from their perspective, not in any way challenge I think

11:29:14 1 what you said, then I think that's okay. That's within
11:29:18 2 what I'm okay with having happen.

11:29:21 3 I don't recall the defendants saying anything
11:29:25 4 that you said was wrong, or misleading, or made some use
11:29:30 5 of it other than to say, Judge, just to put things in
11:29:35 6 perspective, this is how I see it. That's the way I took
11:29:38 7 it. So I don't -- I don't know what the record will
11:29:40 8 reflect of what they actually did, but that's what I used
11:29:43 9 it for was, had you said the same thing during your
11:29:45 10 tutorial, I got the feeling it was exactly the same thing.

11:29:50 11 MR. BURGER: Thank you, your Honor. I just
11:29:51 12 wanted that to be clear, so I appreciate you clarifying.

11:29:58 13 THE COURT: I don't think that defendant -- yeah.
11:30:01 14 I don't think defendant in any way tried to take advantage
11:30:03 15 of what you did in the tutorial in a way that I think
11:30:06 16 would be inappropriate. I think you took it and used it
11:30:09 17 as a tutorial to help me understand it and I think that's
11:30:12 18 okay. So I'll overrule your objection to that extent.

11:30:16 19 Is there anything else we need to take up?

11:30:18 20 MR. BURGER: No, your Honor.

11:30:20 21 MR. BELANGER: Your Honor.

11:30:20 22 THE COURT: Yes, sir.

11:30:21 23 MR. BELANGER: I apologize. I missed this in
11:30:25 24 your explanation. I know you said we would start the
11:30:28 25 trial on June 21st. Did you give us a number of trial

11:30:32 1 days that you were setting aside?

11:30:33 2 THE COURT: My guess is a two-patent case, you're
11:30:39 3 probably looking at somewhere between 13 to 15 hours per
11:30:44 4 side.

11:30:45 5 MR. BELANGER: (Moving head up and down.)

11:30:46 6 THE COURT: I don't have any huge desire -- let
11:30:49 7 me say one other thing. The most likely scenario is that
11:30:54 8 we will have -- the reason I have you all pick the jury
11:30:57 9 the week before so I could start on Monday morning, that
11:31:00 10 doesn't mean I'm trying to jam the trial into one week
11:31:03 11 just, you know, to get it done. The more likely scenario,
11:31:07 12 because of my docket, is that I don't even have to look.
11:31:12 13 I probably have a Markman set, or two or three, on that
11:31:15 14 Friday.

11:31:16 15 So we'll probably go Monday through Thursday, if
11:31:18 16 we can finish, great. If you get finished, great. If we
11:31:23 17 don't get finished, you may be doing your -- we may be
11:31:26 18 finishing witnesses and doing closing arguments the
11:31:29 19 following Monday. But I have no -- I will have no march
11:31:36 20 through the south to get us done and a verdict by sometime
11:31:41 21 in that first week.

11:31:43 22 Now, it's a full year from now, so my patience
11:31:46 23 may have waned between now and then. But so far, I like
11:31:51 24 lawyers, I like trials, I look forward to these. I'm not
11:31:56 25 going to ask you all to mediate this. I think it's good

11:32:00 1 if you do. I think it's great if you do. I think it's
11:32:02 2 great if you mediate it and settle it because I think that
11:32:06 3 can be what's best for your clients. But I really like
11:32:09 4 jury trials and I really like jury patent trials. So as
11:32:12 5 far as I'm concerned, it will be like Christmas in June to
11:32:13 6 have goods lawyers come in and try the case.

11:32:16 7 So one other thing and I'll have forgotten I told
11:32:20 8 you this, so I'm sure I'll repeat it. But the way I like
11:32:24 9 to do things is, generally speaking, only place where that
11:32:28 10 I get a little skittish is, I don't -- I really dislike
11:32:32 11 carrying witnesses overnight. Now, if you put your
11:32:35 12 witness on for 20 minutes on direct and then, the next
11:32:39 13 morning, we're going to start with the same witness on
11:32:42 14 direct, I don't care about that. That's -- you know,
11:32:44 15 that's fine.

11:32:45 16 I really don't like you putting your witness on
11:32:50 17 on direct, for example, and getting halfway through cross
11:32:55 18 and then, stopping. Or I don't like giving people the
11:32:57 19 opportunity to go overnight in that situation. So we may
11:33:03 20 go -- we may play a little bit with the end of the day and
11:33:06 21 when I finish, if I can finish with the witness, I will
11:33:10 22 almost always try to do that within reason for y'all's
11:33:14 23 planning purposes.

11:33:15 24 But that being said, I also understand that when
11:33:17 25 I finish trial, you have your second day of work getting

11:33:19 1 ready for the next day of trial. So again, I'm probably
11:33:23 2 hopefully the most sympathetic trial judge in terms of
11:33:26 3 wanting you all to do what's ever best for you all to get
11:33:29 4 this case tried fairly and work with your witnesses and do
11:33:33 5 all that.

11:33:33 6 But that if I have a particular oddity about me
11:33:38 7 is, I like to finish witnesses, you know, before we -- if
11:33:43 8 we can, before we take an overnight break. Other than
11:33:46 9 that, it's pretty vanilla.

11:33:52 10 So anything else I can address?

11:33:54 11 MR. BELANGER: Thank you, your Honor.

11:33:55 12 MR. BURGER: No, your Honor.

11:33:56 13 Thank you very much.

11:33:57 14 THE COURT: And I'll apologize in advance because
11:33:58 15 I'm sure I'll repeat that because I'd forgotten I told
11:34:02 16 you. But I wish you the best of luck. Have a good week
11:34:05 17 and be safe out there. Take care.

18 MR. BURGER: Thank you, your Honor.

19 MR. BELANGER: Thank you, your Honor.

20 (End of proceedings.)

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UNITED STATES DISTRICT COURT)
WESTERN DISTRICT OF TEXAS)

I, LILY I. REZNIK, Certified Realtime Reporter,
Registered Merit Reporter, in my capacity as Official
Court Reporter of the United States District Court,
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/s/Lily I. Reznik
LILY I. REZNIK, CRR, RMR
Official Court Reporter
United States District Court
Austin Division
501 W. 5th Street,
Suite 4153
Austin, Texas 78701
(512)391-8792
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LILY I. REZNIK, OFFICIAL COURT REPORTER
U.S. DISTRICT COURT, WESTERN DISTRICT OF TEXAS (AUSTIN)